

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

CASE NUMBER 73-1000

No. 73

**STATE OF MINNESOTA, BY ITS ATTORNEY
GENERAL, PETITIONER.**

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

QUESTION FILED CERTIORARI FILED MAY 11, 1973

ANSWER FILED OCTOBER 10, 1973.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, BY ITS ATTORNEY
GENERAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a]

[Captions omitted]

[fol. 1-2]

**IN DISTRICT COURT OF COOK COUNTY,
ELEVENTH JUDICIAL DISTRICT**

**STATE OF MINNESOTA, by HARRY H. PETERSON, Its Attorney
General, Petitioner,**

vs.

PAUL QUODONCE, M. L. BURNS, as Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent; Me Shaix, Unknown Heirs of Me Shaix, Deceased; Nancy McMillan Penay see, Louise May-maush-kaw-aush, Edward Plante, Louise Planje, Theodore Plante, Unknown Heirs of Louise May-maush-kaw-aush, Narcisse Weesh-koob, Joseph Weesh-koob, Cecilia Weesh-koob Beargrease, Catherine Scott (Mrs. Amyotte), Unknown Heirs of Narcisse Weesh-koob, Deceased; Unknown Heirs of Catherine Scott (Mrs. Amyotte), Deceased; Josetta Frost, John Caribo (May-ah-o-say), Sah-gah-sheak, John Mitchell, Unknown Heirs of John Mitchell, Deceased; Unknown Heirs of John Caribo, Deceased; Mary Mitchell, Sah-man-equay-gah-bo, Joseph Long Body (O tah tah gay), Unknown Heirs of Joseph Long Body, Deceased; Joseph Long Body, Jr., Ah-zha-day-gwan-a-beke (Mrs. John Zimmerman); William Howensten, Unknown Heirs of William Howensten, Deceased; Annie Howensten, Unknown Heirs of Annie Howensten, Deceased; Nancy Thomas, (Hunter); and the United States of America; Also All Other Persons Unknown Claiming Any Right, Title, Estate, Interest or Lien in the Real Estate Described in the Petition Herein, Respondents

PETITION—Filed February 6, 1936

**In the Matter of the Condemnation of Certain Lands for
Trunk Highway Purposes**

[fol. 3] To the above named court the State of Minnesota brings this petition and respectfully states and alleges:

I

That these proceedings are taken in the name of and in behalf of the State of Minnesota by Harry H. Peterson, its

Attorney General, and at the request of N. W. Elsberg, the duly appointed, qualified and acting Commissioner of Highways of the State of Minnesota; that said Commissioner of Highways is by Chapter 323, Laws 1921, charged with the designation, construction, location, reconstruction, improvement and maintenance of trunk highways within said state, and authorized and empowered to acquire by condemnation, as provided by statute, all rights of way needed in laying out and constructing said trunk highways.

II

That said Commissioner of Highways has heretofore duly located and designated as Constitutional Trunk Highway Number One, now designated as Trunk Highway Number 61, a trunk highway upon and passing over the lands herein described.

III

That said Commissioner of Highways has duly determined to acquire and desires to acquire and take by these proceedings the lands hereinafter described for the purpose of laying out, constructing, improving and maintaining thereon a trunk highway, the same being a part of Constitutional Trunk Highway Number One, now designated as Trunk Highway Number 61, and has determined that it is necessary that the same be taken for public use; but no claim to or interest in any buildings or structures on said lands is to be obtained by the petitioner, and all buildings and structures on any of said lands are to remain the property of the owners of said premises, but are to be removed from the lands taken for such right of way.

IV

That the lands desired and proposed to be so taken are situate in Cook County, Minnesota, and are described as follows, and that the names of all persons appearing of record or known to your petitioner to be the owners of said lands or interested therein, including all whom your petitioner has been able by investigation and inquiry to discover, together with the nature of the ownership of each as nearly as can be ascertained, are as follows:

[fol. 4] **Parcel 5 (61=1-47-3)—**

All that part of the two following described tracts:

1. Government Lot 5 of section 5, township 62 north, range 5 east;

2. Southwest quarter of the northwest quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet and there terminating;

containing 12.79 acres, more or less.

Names of persons interested in said Parcel 5 and nature of interest:

Name	Nature of Interest
Paul Quodonce	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 6 (61 = 1-47-3)

All that part of the following described tract:

Government Lot 6 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet; thence deflect to the right on a 1°46' curve, delta angle 15°34', for a distance

of 881.1 feet; thence on tangent to said curve for a distance of 500 feet and there terminating;
containing 12.32 acres, more or less.

Names of persons interested in said Parcel 6 and nature of interest:

[fol. 5]

Name	Nature of Interest
Me Shaix	Owner under Indian Allotment
Unknown heirs of Me Shaix, deceased;	Claimants of an interest
Nancy McMillan Penay see) M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 7 (61 = 1-47-3)

All that Part of the following described tract:

Government Lots 7 and 8 of section 5, Township 62 north,
range 5 east;

which lies within a distance of 200 feet on each side of the
following described line:

Beginning at a point on the west line of said Government
Lot 7, distant 612 feet south of the northwest corner
thereof; thence run northeasterly at an angle of $89^{\circ}30'$ with
the west line thereof; for a distance of 937.3 feet; thence
deflect to the left on a $2^{\circ}00'$ curve, delta angle $37^{\circ}20'$, for a
distance of 1856.7 feet; thence on tangent to said curve for
a distance of 200 feet and there terminating;
containing 24.38 acres, more or less.

Names of persons interested in said Parcel 7 and nature of interest:

Name	Nature of Interest
Louise May-maush-kaw-aush	
Edward Plante	
Louise Plante	
Theodore Plante	Owners under Indian Allotment

Name	Nature of Interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust
Unknown heirs of Louise May-maush-kaw-aush	Claimants of an interest

[fol. 6] Parcel 11 (61 = 147-3)—

All that part of the following described tract:
Government Lot 3 of section 33, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east line of said Government Lot 3, distant 536 feet north of the southeast corner thereof; thence run southwesterly at an angle of 77°20' with the east line thereof for a distance of 1065.2 feet; thence deflect to the left on a 1°00' curve, delta angle 24°56', for a distance of 500 feet and there terminating;

containing 12.57 acres, more or less.

Names of persons interested in said Parcel 11 and nature of interest:

Name	Nature of Interest
Narcisse Weesh-koob)
Joseph Weesh-koob)
Cecilia Weesh-koob Bear-grease	) Owners under Indian Allotment
Catherine Scott (Mrs. Amyotte))
Unknown heirs of Narcisse Weesh-koob, deceased;)
Unknown heirs of Catherine Scott (Mrs. Amyotte,) deceased,	) Claimants of an interest

Name	Nature of Interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent

United States of America	Holder of Fee in Trust
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Parcel 15 (S1 = 1-47-3)—

All that part of the following described tract:

Southwest quarter of the northeast quarter (SW $\frac{1}{4}$) of section 34, township 63 north, range 5 east; which lies within a distance of 200 feet on each side of the following described line:

[fol. 7] Beginning at a point on the east line of said section 34, distant 1128 feet south of the northeast corner thereof; thence run southwesterly at an angle of 40°20' with said east section line for a distance of 453.8 feet; thence deflect to the right on a 1°30' curve, delta angle 15°30' for a distance of 1033.3 feet; thence on tangent to said curve for a distance of 697 feet; thence deflect to the left on a 2°12' curve, delta angle 18°44', for a distance of 600 feet and there terminating;

containing 5.34 acres, more or less.

Names of persons interested in said Parcel 15 and nature of interest:

Name	Nature of Interest
Narcisse Weesh-koob)	
Joseph Weesh-koob)	
Cecilia Weesh-koob Bear-)	Owners under Indian Allot-
grease)	ment
Catherine Scott (Mrs.)	
Amyotte)	
Unknown heirs of)	
Narcisse Weesh-koob,)	
deceased)	
Unknown heirs of)	Claimants of an interest
Catherine Scott (Mrs.)	
Amyotte, deceased;)	

Name	Nature of Interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 20 (61-147-3)—

All that part of the two following described tracts:

1. Government Lot 1 of section 26, township 63 north, range 5 east;
2. Northeast quarter of the southeast quarter. (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 26, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east and west quarter line of section 25, township 63 north, range 5 east, distant 1497 feet [fol. 8] east of the west quarter corner thereof; thence run southwesterly at an angle of 44°00' with said east and west quarter line for a distance of 1867.3 feet; thence deflect to the right on a 1°30' curve, delta angle 33°42', for a distance of 2000 feet and there terminating;

containing 14.10 acres, more or less.

Names of persons interested in said Parcel 20 and nature of interest:

Name	Nature of Interest
Josetta Frost	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 23 (61-147-3)

All that part of the following described tract:

Southeast quarter of the southeast quarter SE $\frac{1}{4}$ SE $\frac{1}{4}$ of section 24, township 63 north, range 5 east; which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the south line of said section 24, distant 872 feet west of the southeast corner thereof; thence run northeasterly at an angle of 43° 40' with said south section line for a distance of 1500 feet and there terminating excepting therefrom the right of way of existing highway containing 11.43 acres, more or less.

Names of persons interested in said Parcel 23 and nature of interest:

[fol. 9]

Name	Nature of Interest
John Caribo (May-ah-o-say)	Owner under Indian Allotment
Sah-gah-sheak	
John Mitchell	
Unknown heirs of	
John Mitchell, deceased;	Claimants of an interest
Unknown heirs of	
John Caribo, deceased;	
Mary Mitchell	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minn. and Special Disbursing Agent.
United States of America	Holder of Fee in Trust

Parcel 24 (61-147-3)-

All that part of the two following described tracts:

1. Government Lots 4 and 5 of section 19, township 63 north, range 6 east;

2. Northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of section 19, township 63 north, range 6 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 19, distant 1759.6 feet south of the west quarter corner thereof; thence run northeasterly at an angle of 44°24' with said west section line for a distance of 2614.5 feet; thence deflect to the right on a 1°00' curve, delta angle 10°00', for a distance of 200 feet and there terminating;

containing 23.29 acres, more or less.

Names of persons interested in said Parcel 24 and nature of interest:

[fol. 10]

Name	Nature of Interest
Sah-man-equay-gah-bo	Owner under Indian Allotment
Joseph Long Body (O tah tah gay)	
Unknown heirs of Joseph Long Body deceased;	
Joseph Long Body, Jr.	
Ah-zha-day-gwam-a beke, (Mrs. John Zimmerman)	Claimants of an interest
William Howensten,	
Unknown heirs of	
William Howensten deceased;	
Annie Howensten	
Unknown heirs of	
Annie Howensten, deceased;	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disbur- sing Agent
United States of America	Holder of fee in trust

Parcel 25 (61-147-3)

All that part of the following described tract:
Government Lot 3 of section 19, township 63 north, range
6 east;

which lies within a distance of 200 feet on each side of the
following described line:

Beginning at a point on the west line of said section 19,
distant 1759.6 feet south of the west quarter corner thereof;
thence run northeasterly at an angle of $44^{\circ}24'$ with said west
section line for a distance of 2614.5 feet; thence deflect to
the right on a $1^{\circ}00'$ curve, delta angle $10^{\circ}00'$, for a distance
of 1000 feet; thence on tangent to said curve for a distance
of 200 feet and there terminating;

containing 9.45 acres, more or less.

Names of persons interested in said Parcel 25 and nature
of interest:

[fol. 11]

Name	Nature of Interest
Nancy Thomas (Hunter)	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota; and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Wherefore, Your petitioner prays that such proceedings
may be had herein as are provided by law; that it be ad-
judged that said taking is authorized by law; that the use
for which said property is proposed to be taken is a public
use; that the petitioner obtain the right to construct and
maintain temporary snow fences upon the tracts and par-
cels of land herein described and the lands adjacent thereto,
as provided by law; that the petitioner shall have the ex-
clusive control and regulation of the culture and cutting
of all grasses, shrubs, trees and natural growth now exist-
ing on the lands being acquired herein and the planting of

new grasses, shrubs and trees thereon; that three competent and disinterested persons, residents of said Cook County, be appointed to ascertain and report the amount of damages that will be sustained by the several owners and persons interested on account of such taking; that the time and place of the first meeting and the compensation of said commissioners be fixed; and that an order be made herein pursuant to the statute in such case made and provided:

State of Minnesota, by Harry H. Peterson, Attorney General, Ordner T. Bundlie, Assistant Attorney General, Attorneys for Petitioner, 1246 University Avenue, St. Paul, Minnesota.

Duly sworn to by Ordner T. Bundlie. Jurat omitted in printing.

[fol. 12] [File endorsement omitted.]

IN DISTRICT COURT OF COOK COUNTY

NOTICE OF FILING OF PETITION—Filed April 9, 1936

To the Respondents above named:

You and each of you are hereby notified that the above named petitioner will, on the ninth day of April, 1936 at 1:00 o'clock P. M. of said day, or as soon thereafter as counsel can be heard, present to the court above named, at chambers in the court house, at Grand Marais, Cook County, Minnesota, a petition in the above entitled proceeding for the condemnation of certain lands for trunk highway purposes, which said petition is now on file in the office of the clerk of said court.

The objects of said petition are to have the lands herein-after described condemned and taken by the petitioner for the right of way for the laying out, constructing, improving and maintaining thereon of a trunk highway, the same being a part of Constitutional Trunk Highway Number One, now designated as Trunk Highway Number 61, and to have the court determine and adjudge that the use for which such lands are sought to be acquired is a public use, that said taking is authorized by law, that said petitioner obtain the right to construct and maintain temporary snow fences upon the

tracts and parcels of land herein described and the lands adjacent thereto as provided by law, that the petitioner shall have the exclusive control and regulation of the culture and cutting of all grasses, shrubs, trees, and natural growth now existing on the lands being acquired herein and the planting of any grasses, shrubs and trees thereon, to have the court appoint commissioners to ascertain and report the amount [fol. 13] of damages that will be sustained by the several owners and the persons interested on account of such taking, and to have made an order of the court herein pursuant to the statute in such case made and provided; and you and each of you are entitled to and may appear before said court at said time and place and offer evidence relating thereto and show cause, if any, why said petition should not be granted.

The lands desired and proposed to be so taken are situate in Cook County, Minnesota, and are described as follows and the names of all persons appearing of record or known to your petitioner to be the owners of said lands or interested therein, including all whom your petitioner has been able by investigation and inquiry to discover, together with the nature of the ownership of each as nearly as can be ascertained, are as follows:

Parcel 5 (61-1-47-3)—

All that part of the two following described tracts:

1. Government Lot 5 of section 5, township 62 north, range 5 east;
2. Southwest quarter of the northwest quarter (SW $\frac{1}{4}$) of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet and there terminating;

containing 12.79 acres, more or less.

Names of persons interested in said Parcel 5 and nature of interest:

Name	Nature of Interest
Paul Quodonce	Owner under Indian Allotment.
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

[fol. 14] Parcel 6 (61 = 1-47-3)

All that part of the following described tract:

Government Lot 6 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet; thence deflect to the right on a 1°46' curve, delta angle 15°34', for a distance of 881.1 feet; thence on tangent to said curve for a distance of 500 feet and there terminating;

containing 12.32 acres, more or less.

Names of persons interested in said Parcel 6 and nature of interest:

Name	Nature of Interest
Me Shaix	Owner under Indian Allotment
Unknown heirs of Me Shaix, deceased;) Nancy McMillan Penay see)	Claimants of an interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 7 (61 = 1-47-3)

All that Part of the following described tract:

Government Lots 7 and 8 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said Government Lot 7, distant 612 feet south of the northwest corner thereof; thence run northeasterly at an angle of $89^{\circ}30'$ with the west line thereof; for a distance of 937.3 feet; thence deflect to the left on a $2^{\circ}00'$ curve, delta angle $37^{\circ}20'$, for a [fol. 15] distance of 1866.7 feet; thence on tangent to said curve for a distance of 200 feet and there terminating; containing 24.38 acres, more or less.

Names of persons interested in said Parcel 7 and nature of interest:

Name	Nature of Interest
Louise May-maush-kaw-aush	
Edward Plante	) Owners under Indian Allotment
Louise Plante)
Theodore Plante)
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust
Unknown heirs of Louise May-maush-kaw-aush	Claimants of an interest

Parcel 11 (61 = 1-47-3)—

All that part of the following described tract:

Government Lot 3 of section 33, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east line of said Government Lot 3, distant 536 feet north of the southeast corner thereof; thence run southwesterly at an angle of $77^{\circ}20'$ with the east line thereof for a distance of 1065.2 feet; thence deflect to the left on a $1^{\circ}00'$ curve, delta angle $24^{\circ}56'$, for a distance of 500 feet and there terminating; containing 12.57 acres, more or less.

Names of persons interested in said Parcel 11 and nature of interest:

[fol. 16]

Name	Nature of Interest
Narcisse Weesh-koob)	
Joseph Weesh-koob)	
Cecilia Weesh-koob Bear-)	Owners under Indian Allot-
grease)	ment
Catherine Scott (Mrs.)	
Amyotte)	
Unknown heirs of)	
Narcisse Weesh-koob, de-)	
ceased;)	
Unknown heirs of)	Claimants of an interest
Catherine Scott (Mrs.)	
Amyotte,) deceased,)	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disburs- ing Agent
United States of America	Holder of Fee in Trust

Parcel 15 (61 = 1-47-3) —

All that part of the following described tract:
Southwest quarter of the northeast quarter (SW $\frac{1}{4}$
NE $\frac{1}{4}$) of section 34, township 63 north, range 5 east;
which lies within a distance of 200 feet on each side of the
following described line:

Beginning at a point on the east line of said section 34,
distant 1128 feet south of the northeast corner thereof;
thence run southwesterly at an angle of $40^{\circ}20'$ with said

east section line for a distance of 453.8 feet; thence deflect to the right on a $1^{\circ}30'$ curve, delta angle $15^{\circ}30'$ for a distance of 1033.3 feet; thence on tangent to said curve for a distance of 697 feet; thence deflect to the left on a $2^{\circ}12'$ curve, delta angle $18^{\circ}44'$, for a distance of 600 feet and there terminating;

containing 5.34 acres, more or less.

Names of persons interested in said Parcel 15 and nature of interest:

[fol. 17]

Name	Nature of Interest
Narcisse Weesh-koob)	
Joseph Weesh-koob)	
Cecilia Weesh-koob Bear-)	
grease)	Owners under Indian Allot- ment
Catherine Scott (Mrs.)	
Amyotte)	
Unknown heirs of)	
Narcisse Weesh-koob,)	
deceased)	
Unknown heirs of)	Claimants of an interest
Catherine Scott (Mrs.)	
Amyotte,) deceased ;)	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disbur- sing Agent
United States of America	Holder of Fee in Trust

Parcel 20 (61-1-47-3)

All that part of the two following described tracts:

1. Government Lot 1 of section 26, township 63 north, range 5 east;

2. Northeast quarter of the southeast quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 26, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east and west quarter line of section 25, township 63 north, range 5 east, distant 1497 feet west of the west quarter corner thereof; thence run south-easterly at an angle of 44°00' with said east and west quarter line for a distance of 1867.3 feet; thence deflect to the right on a 1°30' curve, delta angle 33°42', for a distance 2000 feet and there terminating; containing 14.10 acres, more or less.

Names of persons interested in said Parcel 20 and nature of interest:

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Name	Nature of Interest
Rosetta Frost	Owner under Indian Allotment
L. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 23 (61-147-3)

All that part of the following described tract:

Southeast quarter of the southeast quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 24, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the south line of said section 24, distant 872 feet west of the southeast corner thereof; thence run northeasterly at an angle of 43°40' with said south section line for a distance of 1500 feet and there terminating; excepting therefrom the right of way of existing highway; containing 11.43 acres, more or less.

Names of persons interested in said Parcel 23 and nature of interest:

Name

Nature of Interest

John Caribo (May-ah-o-say) Owner under Indian Allotment

Sah-gah-sheak)	
John Mitchell)	
Unknown heirs of)	
John Mitchell, deceased;)	Claimants of an interest
Unknown heirs of)	
John Caribo, deceased;)	
Mary Mitchell)	

M. L. Burns

As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minn. and Special Disbursing Agent.

United States of America

Holder of Fee in Trust

[fol. 19] Parcel 24 (61-147-3)

All that part of the two following described tracts:

1. Government Lots 4 and 5 of section 19, township 63 north, range 6 east;

2. Northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of section 19, township 63 north, range 6 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 19, distant 1759.6 feet south of the west quarter corner thereof; thence run southwesterly at an angle of 40°20' with said section line for a distance of 2614.5 feet; thence deflect to the right on a 1°00' curve, delta angle 10°00', for a distance of 200 feet and there terminating;

containing 23.29 acres, more or less.

Names of persons interested in said Parcel 24 and nature of interest:

Name	Nature of Interest
Sah-man-equay-gah-bo	Owner under Indian Allotment
Joseph Long Body (O täh tah gay)	
Unknown heirs of Joseph Long Body deceased;	
Joseph Long Body, Jr.	
Ah-zha-däy-gwam-a beke (Mrs. John Zimmerman)	Claimants of an interest
William Howensten	
Unknown heirs of William Howensten, deceased;	
Annie Howensten	
Unknown heirs of Annie Howensten, deceased;	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disbur- sing Agent
United States of America	Holder of fee in trust

[fol. 20] Parcel 25 (61-147-3)

All that part of the following described tract:

Government Lot 3 of section 19, township 63 north, range
6 east;

which lies within a distance of 200 feet on each side of the
following described line:

Beginning at a point on the west line of said section 19,
distant 1759.6 feet south of the west quarter corner thereof;
thence run northeasterly at an angle of $44^{\circ}24'$ with said west
section line for a distance of 2614.5 feet; thence deflect to
the right on a $1^{\circ}00'$ curve, delta angle $10^{\circ}00'$, for a distance
of 1000 feet; thence on tangent to said curve for a distance
of 200 feet and there terminating;

containing 9.45 acres, more or less.

Names of persons interested in said Parcel 25 and nature of interest:

Name	Nature of Interest
Nancy Thomas (Hunter)	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust
State of Minnesota, by Harry H. Peterson, Attorney General, Ordner T. Bundlie, Assistant Attorney General. Attorneys for Petitioner, 1246 University Avenue, St. Paul, Minnesota.	

[File endorsement omitted.]

[fol. 21] STATE OF MINNESOTA,
County of Cook, ss:

I hereby certify and return, that after due and diligent search, I have been unable to find the within defendants Paul Quodonce and Cecil Weesh-koob Beargrease within my said county, and the defendants aforesaid cannot be found within said Cook County.

Dated this 5th day of March, 1936,

Chas. Taylor, Sheriff Cook County, Minn.

Sheriff's Fees, Return \$2.00
Mileage \$

STATE OF MINNESOTA,
County of Cass, ss:

I hereby certify and return that on the 2nd day of March 1936 at the Village of Cass Lake in said County and State I served the attached Notice upon M. L. Burns as Superintend-

ent of the Consolidated Chippewa Agency at Cass Lake, Minnesota and special disbursing agent therein named personally by handing to and leaving with him true and correct copy thereof.

O. E. Meny, Sheriff of Cass County, Minnesota.

Sheriff's Mileage	\$5.40
Copy	\$1.00
Total	\$6.40

STATE OF MINNESOTA,

County of Cook, ss:

I hereby certify and return, that at the Village of Grand Marais, in said County of Cook and State of Minnesota, on the 4th day of March 1936 I served the attached Notice upon Joseph Weesh-koob and Mrs. John Zimmerman, two of the persons therein named by handing to and leaving with each of them a true and correct copy thereof; And I further certify and return that at Grand Portage in said County of Cook and State of Minnesota on the 5th day of March 1936 I served the attached Notice upon Joseph Longbody, Junior and Nancy Thomas Hunter two of said persons [fol. 22] therein named by handing to and leaving with each of them a true and correct copy thereof.

Dated this 5th day of March 1936.

Chas. Taylor, Sheriff of Cook County, Minnesota.

Fees:

Service	\$4.00
Travel	\$6.20
Total	\$10.20

[STATE] OF MINNESOTA,

County of Ramsey, ss:

I hereby certify and return, that at the City of St. Paul, County and State aforesaid, on the 17th day of March A. D. 1936 I served the Notice In the Matter of the Condemnation of Certain Lands for Trunk Highway Purposes hereto attached upon the within named George F. Sullivan, United

States District Attorney for Minnesota personally, by handing to and leaving with him a true and correct copy thereof.

Dated this 17th day of March A. D. 1936.

Thomas J. Gibbons, Sheriff of Ramsey, County, Minn., by Ienes S. Moran, Deputy.

Sheriff's fees Service	\$1.00
Travel . . . . .	.20
	<hr/>
	\$1.20

STATE OF MINNESOTA,
County of St. Louis, ss:

I hereby certify and return, that at Duluth in the County and State aforesaid, on the 12th day of March A. D. 1936, I served the Notice hereto attached upon the within named Paul Quodonce personally by handing to and leaving with him a true and correct copy thereof.

Dated at Duluth, Minnesota, this 12th day of March, 1936.

Samuel M. Owens, Sheriff, St. Louis County, Minnesota, by Frank G. Dickson, Deputy Sheriff.

[fol. 23]

Sheriff's Fees, Service	\$1.00
Travel	\$.60
	<hr/>
Total	\$1.60

IN DISTRICT COURT OF COOK COUNTY

[Title omitted]

PETITION FOR REMOVAL OF CAUSE TO FEDERAL COURT—Filed
April 11, 1936

To the Honorable Judges of the District Court of the State of Minnesota, Eleventh Judicial District, In and For the County of Cook:

Now comes the United States of America, one of the respondents in the above entitled cause, by George F. Sullivan, its United States Attorney for the District of Minnesota,

appearing specially and for no other purpose; and respectfully states to the Court that your petitioner is a sovereign; that the respondent Mark L. Burns, as Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and special disbursing agent, is an agent and officer of your petitioner; that the remaining respondents are Chippewa Indian wards of your petitioner.

That this is an action of a civil nature at law and is brought by the State of Minnesota, under the eminent domain laws of the State of Minnesota, the same being Chapter 41, Mason's Minnesota Statutes, 1927, for the purpose of condemning an easement for highway purposes across certain lands owned by your petitioner and by it held in trust for the Chippewa Indian wards of your petitioner, the same being respondents above named.

That this is an action which arises under the constitution and laws of the United States, inasmuch as the United States is made a party hereto, and the United States is an indispensable party hereto; that the rights of the Indian wards of the United States are involved, as well as the relationship of the said wards to the United States, which matters are regulated and governed by the United States, and by reason of the premises jurisdiction of the subject matter of this [fol. 24] action is conferred upon the District Court of the United States of America.

That by reason of the value of the lands described in the petition, the amount in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand (\$3,000) Dollars.

That as appears in the stipulation hereto attached, entered into between George F. Sullivan, United States Attorney for the District of Minnesota, and attorney for the respondents, and O. T. Bundlie, Assistant Attorney General of the State of Minnesota, and attorney for petitioner, notice of this petition is expressly waived and consent is given to the transfer herein prayed. That a formal bond is expressly waived in this matter.

Wherefore, your petitioner prays this Honorable Court to proceed no further herewith except to make an order for the removal of this cause to the said District Court of the United States for the District of Minnesota, Fifth Division, and to accept this petition and cause the record herein to be re-

moved into the said District Court of the United States for the District of Minnesota, Fifth Division, at Duluth, Minnesota.

Dated at St. Paul, Minnesota, this 7th day of April, 1936.
George F. Sullivan, United States Attorney for the District of Minnesota.

IN DISTRICT COURT OF COOK COUNTY

STIPULATION FOR REMOVAL OF CAUSE TO FEDERAL COURT, ETC.—
Filed April 11, 1936

It is hereby stipulated and agreed, by and between Harry H. Peterson, Attorney General of the State of Minnesota, by O. T. Bundlie, Assistant Attorney General and attorney for petitioner above named, and George F. Sullivan, United States Attorney for the District of Minnesota, attorney for respondent United States of America, appearing specially for the United States of America and the remainder of the respondents above named:

1

That a general appearance is hereby entered in the above entitled cause on behalf of all respondents above named, save and except the United States of America, which is appearing specially for the sole purposes of effecting removal of the above entitled cause to the United States District Court, and other objects hereinafter set out.

[fol. 25]

2

That the above entitled cause may be removed to the United States District Court for the District of Minnesota for further proceedings, and the consent of the petitioner is expressly given to the said transfer.

3

That notice of the petitioner for removal is hereby expressly waived by the petitioner.

4

That the good faith and credit of the respondent United States of America be accepted as good and sufficient surety

for good faith of the removal and any costs that might be incurred, a formal bond according to the statute in such case made and provided, being expressly waived by the petitioner.

5

That the cause be set on for hearing before the Honorable Robert C. Bell on the 18th day of May, 1936, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, in the court room in the Federal Building in the city of Duluth, Minnesota, at which time the petitioner of the State of Minnesota may be heard and such proceedings had thereon as prayed in the said petition.

6

That further notice of the time and place of presentation of the said petition is hereby expressly waived by all of the respondents above named.

Dated at St. Paul, Minnesota, this 7th day of April, 1936.

George F. Sullivan, United States Attorney for the District of Minnesota. O. T. Bundlie, Assistant Attorney General, State of Minnesota.

[File endorsement omitted.]

[fol. 26] IN DISTRICT COURT OF COOK COUNTY

[Title omitted]

ORDER OF REMOVAL

The Court having examined the petition of George F. Sullivan, United States Attorney, and the stipulation thereto attached, the said petition is accordingly accepted, and

It Is Hereby Ordered that no further proceedings be had herein, and that the cause be removed for hearing in the District Court of the United States of America for the District of Minnesota, Fifth Division, at Duluth, Minnesota.

Dated this 8th day of April, 1936.

By the Court.

C. R. Magney, Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27] IN DISTRICT COURT OF COOK COUNTY

[Title omitted]

AFFIDAVIT AS TO NON-RESIDENCE OF CERTAIN RESPONDENTS,
ETC.—Filed April 16, 1936

[fol. 28] Bert McMullen, being duly sworn, says that he is one of the attorneys for the State of Minnesota, petitioner herein; that the respondents, Edward Plante, Louise Plante, Theodore Plante, and Josetta Frost, are not residents of the State of Minnesota, and that affiant believes that said respondents are not residents of the State of Minnesota; that on the 18th day of February, 1936 he deposited in the post office at St. Paul, Minnesota, properly enveloped, with postage fully prepaid, a true and correct copy of the notice herein, addressed to each of the following named respondents at their respective places of residence, to-wit:

Edward Plante, 2801 N. Palmer Street, Milwaukee, Wisconsin.

Louise Plante, 2801 N. Palmer Street, Milwaukee, Wisconsin.

Theodore Plante, Box 800, City Hall, New York, New York.

Josetta Frost, Odanah, Wisconsin.

And at the place of residence and post office address of each of said respondents is as hereinabove stated.

Affiant further states that he believes the respondents, Me Shaix, Nancy McMillian Penay see, Louise May-maush-kaw-aush, Narcisse Weesh-koob, Catherine Scott (Mrs. Amyotte), John Caribo (May-ah-osay), Sah gah sheak, John Mitchell, Mary Mitchell, Sah-man-equay-gah-bo, Joseph Long Body (O tah tah gay), William Howenstine, and Annie Howenstine are not residents of the State of Minnesota; that the places of residence of said respondents are unknown to your petitioner and to affiant; and that after diligent inquiry the places of residence of said respondents cannot be ascertained by affiant.

Bert McMullen.

Subscribed and sworn to before me this 18th day of February, 1936. J. R. Stoltenberg, Notary Public, in and for and Residing in Hennepin County, Minn. My commission expires May 30, 1940. (Notarial Seal.)

[fol. 29] IN DISTRICT COURT OF COOK COUNTY

[Title omitted]

AFFIDAVIT AS TO PUBLICATION OF NOTICE—Filed April 16,
1936

NOTICE

To the Respondents above named:

You and each of you are hereby notified that the above named petitioner will, on the 9th day of April, 1936, at 1 [fol. 30] o'clock P. M. of said day, or as soon thereafter as counsel can be heard, present to the court above named, at chambers in the court house, at Grand Marais, Cook County, Minnesota, a petition in the above entitled proceeding for the condemnation of certain lands for trunk highway purposes, which said petition is now on file in the office of the clerk of said court.

The objects of said petition are to have the lands herein-after described condemned and taken by the petitioner for right of way for the laying out, constructing, improving and maintaining thereon of a trunk highway, the same being a part of Constitutional Trunk Highway Number one, now designated [at] Trunk Highway Number 61, and to have the court determine and adjudge that the use for which such lands are sought to be acquired is a public use, that said taking is authorized by law, that said petitioner obtained the right to construct and maintain temporary snow fences upon the tracts and parcels of land herein described and the lands adjacent thereto as provided by law, that the petitioner shall have the exclusive control and regulation of the culture and cutting of all grasses, shrubs, trees, and natural growth now existing on the lands being acquired herein and the planting of any grasses, shrubs and trees thereon, to have the court appoint commissioners to ascertain and report the amount of damages that will be sustained by the several owners and the persons interested on account of such taking, and to have made an order of the court herein pursuant [the] the statute in such case made and provided; and you and each of you are entitled to and may appear before said court at said time and place and offer evidence relating thereto and show cause, if any, why said petition should not be granted.

The lands desired and proposed to be so taken are situate in Cook County, Minnesota, and are described as follows and the names of all persons appearing of record or known to your petitioner to be the owners of said lands or interested therein, including all whom your petitioner has been able by investigation and inquiry to discover, together with the nature of the ownership of each as nearly as can be ascertained, are as follows:

Parcel 5 (61-1-47-3)—

All that part of the two following described tracts:

1. Government Lot 5 of section 5, township 62 north, range 5 east;
2. Southwest quarter of the northwest quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of section 5, township 62 north, range 5 east; [fol. 31] which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet and there terminating;

containing 12.79 acres, more or less.

Names of persons interested in said Parcel 5 and nature of interest:

Name	Nature of Interest
Paul Quodonce	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent

The United States of America Holder of Fee in Trust

Parcel 6 (61-1-47-33)—

All that part of the following described tract:

Government Lot 6 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of $72^{\circ}08'$ with said west section line for a distance of 1461.9 feet; thence deflect to the right on a $1^{\circ}46'$ curve, delta angle $15^{\circ}34'$, for a distance of 881.1 feet; thence on tangent to said curve for a distance of 500 feet and there terminating;
containing 12.32 acres, more or less.

Names of persons interested in said Parcel 6 and nature of interest:

[fol. 32] Name	Nature of Interest
Me Shaix	Owner under Indian Allotment
Unknown heirs of Me Shaix, deceased;	Claimants of an interest
Nancy McMillan Penay see)	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
The United States of America	Holder of Fee in Trust

Parcel 7 (61-1-47-3)

All that Part of the following described tract:

Government Lots 7 and 8 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said Government Lot 7, distant 612 feet south of the northwest corner thereof; thence run northeasterly at an angle of $89^{\circ}30'$ with the west line thereof; for a distance of 937.3 feet; thence deflect to the left on a $2^{\circ}00'$ curve, delta angle $37^{\circ}20'$, for a distance of 1866.7 feet; thence on tangent to said curve for a distance of 200 feet and there terminating;

containing 24.38 acres, more or less.

Names of persons interested in said Parcel 7 and nature of interest:

Name	Nature of Interest
Louise May-maush-kaw-aush)
Edward Plante)
Louise Plante)
Theodore Plante)
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
Unknown heirs of Louise May-maush-kaw-aush	Claimants of an interest
United States of America	Holder of Fee in Trust

[fol. 33] Parcel 11 (61-1-47-3)—

All that part of the following described tract:

Government Lot 3 of section 33, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east line of said Government Lot 3, distant 536 feet north of the southeast corner thereof; thence run southwesterly at an angle of $77^{\circ}20'$ with the east line thereof for a distance of 1065.2 feet; thence deflect to the left on a $1^{\circ}00'$ curve, delta angle $24^{\circ}56'$, for a distance of 500 feet and there terminating; containing 12.57 acres, more or less.

Names of persons interested in said Parcel 11 and nature of interest:

Name	Nature of Interest
Narcisse Weesh-koob)
Joseph Weesh-koob)
Cecelia Weesh-koob Bear-grease)
Catherine Scott (Mrs. Amyotte)	Owners under Indian Allotment

Name	Nature of Interest
Unknown heirs of Narcisse Weesh-koob, de- ceased;)
Unknown heirs of Catherine Scott (Mrs. Amyotte,) deceased,)
M. L. Burns	Claimants of an interest
United States of America	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disburs- ing Agent
	Holder of Fee in Trust

Parcel 15 (61-1-47-3)—

All that part of the following described tract:

Southwest quarter of the northeast quarter (SW $\frac{1}{4}$
NE $\frac{1}{4}$) of section 34, township 63 north, range 5 east;

[fol. 34] which lies within a distance of 200 feet on each side
of the following described line:

Beginning at a point on the east line of said section
34, distant 1128 feet south of the northeast corner there-
of; thence run southwesterly at an angle of 40°20' with said
east section line for a distance of 453.8 feet; thence deflect
to the right on a 1°30' curve, delta angle 15°30' for a dis-
tance of 1033.3 feet; thence on tangent to said curve for a
distance of 697 feet; thence deflect to the left on a 2°12'
curve, delta angle 18°44', for a distance of 600 feet and there
terminating;

containing 5.34 acres, more or less.

Names of persons interested in said Parcel 15 and nature
of interest:

Name	Nature of Interest
Narcisse Weesh-koob)
Joseph Weesh-koob)
Cecelia Weesh-koob Bear- • grease)
Catherine Scott (Mrs. Amyotte)	Owners under Indian Allot- ment

Name	Nature of Interest
Unknown heirs of Narcisse Weesh-koob, deceased)
Unknown heirs of Catherine Scott (Mrs. Amyotte,) deceased;	) Claimants of an interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbur- sing Agent
United States of America	Holder of Fee in Trust

Parcel 20 (61-1-47-3)—

All that part of the two following described tracts:

1. Government Lot 1 of section 26, township 63 north, range 5 east;
2. Northeast quarter of the southeast quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 26, township 63 north, range 5 east; which lies within a distance of 200 feet on each side of the following described line:

[fol. 35] Beginning at a point on the east and west quarter line of section 25, township 63 north, range 5 east, distant 1497 feet east of the west quarter corner thereof; thence run southwesterly at an angle of 44 degrees 00 minutes with said east and west quarter line for a distance of 1867.3 feet; thence deflect to the right on a 1 degree 30 minutes curve, delta angle 33 degrees 42 minutes, for a distance of 2000 feet and there terminating;

containing 14.10 acres, more or less.

Names of persons interested in said Parcel 20 and nature of interest:

Name	Nature of Interest
Josetta Frost	Owner under Indian Allot- ment

Name	Nature of Interest
I. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
The United States of America	Holder of Fee in Trust

Parcel 23 (61-1-47-3)

All that part of the following described tract:
 Southeast quarter of the southeast quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$)
 of section 24, township 63 north, range 5 east;
 which lies within a distance of 200 feet on each side of the
 following described line:

Beginning at a point on the south line of said section 24,
 distant 872 feet west of the southeast corner thereof; thence
 run northeasterly at an angle of 43° 40' with said south sec-
 tion line for a distance of 1500 feet and there terminating;
 excepting therefrom the right of way of existing highway;
 containing 11.43 acres, more or less.

Names of persons interested in said Parcel 23 and nature
 of interest:

[fol. 36]

Name	Nature of Interest
John Caribo (May-ah-o-say)	Owner under Indian Allot- ment
Sah-gah-sheak)
John Mitchell)
Unknown heirs of)
John Mitchell, deceased;	) Claimants of an interest
Unknown heirs of)
John Caribo, deceased;)
Mary Mitchell)
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minn. and Special Disbursing Agent.

The United States of America Holder of Fee in Trust

Parcel 24 (61-1-47-3)—

All that part of the two following described tracts:

1. Government Lots 4 and 5 of section 19, township 63 north, range 6 east;

2. Northwest quarter of the southwest quarter (NW $\frac{1}{4}$) of section 19, township 63 north, range 6 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 19, distant 1759.6 feet south of the west quarter corner thereof; thence run northeasterly at an angle of 44°24' with said west section line for a distance of 2614.5 feet; thence deflect to the right on a 1°00' curve, delta angle 10°00', for a distance of 200 feet and there terminating;

containing 23.29 acres, more or less.

Names of persons interested in said Parcel 24 and nature of interest:

[fol. 37]

Name	Nature of Interest
Sah-man-equay-gah-bo	Owner under Indian Allotment
Joseph Long Body (O tah tah gay)	
Unknown heirs of Joseph Long Body deceased	
Joseph Long Body, Jr.	
Ah-zha-day-gwam-a beke, (Mrs. John Zimmerman)	Claimants of an interest
William Howensten	
Unknown heirs of William Howensten, deceased;	
Annie Howensten	
Unknown heirs of Annie Howensten, deceased;	

Name	Nature of Interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent

The United States of America Holder of fee in trust.

Parcel 25 (61-1-47-3)

All that part of the following described tract:

Government Lot 3 of section 19, township 63 north, range 6 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 19, distant 1759.6 feet south of the west quarter corner thereof; thence run northeasterly at an angle of $44^{\circ}24'$ with said west section line for a distance of 2614.5 feet; thence deflect to the right on a $1^{\circ}00'$ curve, delta angle $10^{\circ}00'$, for a distance of 1000 feet; thence on tangent to said curve for a distance of 200 feet and there terminating;

containing 9.45 acres, more or less.

Names of persons interested in said Parcel 25 and nature of interest:

[fol. 38]

Name	Nature of Interest
Nancy Thomas (Hunter)	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated, Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent

The United States of America Holder of Fee in Trust

State of Minnesota, by Harry H. Peterson, Attorney General. Ordner T. Bundlie, Assistant Attorney General, Attorneys for Petitioner. 1246 University Avenue, St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Cook, ss:

Leroy Raff being duly sworn, deposes and says that he now is and during all the times hereinafter mentioned has been the publisher and printer in charge of The Cook County News-Herald, a weekly newspaper printed and published in the Village of Grand Marais, in said Cook County, Minnesota, on Thursday of each week.

That he has knowledge of the facts and knows personally that the Quodonce Petition, a printed copy of which, cut and taken from the columns of said newspaper, is hereto attached, (and which is hereafter referred to as "said legal advertisement"), was inserted, printed and published in said newspaper once in each week for — weeks, and that all of said publications were made in the English language.

That said legal advertisement was first inserted, printed and published on Thursday, the 20th day of February 1936 and was printed and published in regular issues of said newspaper on each and every Thursday thereafter until and including Thursday the 5th day of March 1936.

That during all the times herein mentioned said newspaper was and still is qualified as a medium of official and legal publications, as required by the laws of the State of Minnesota; that said newspaper has complied and that at all times herein mentioned has complied with all the requirements that constitute a legal newspaper, as defined and set forth in Sections 3 and 4 of Chapter 484, Session [fol. 39] Laws of Minnesota for 1921, and in Sections 10935 and 10936, Mason's Minnesota Statutes of 1927, and in Chapter 373 of Session Laws of Minnesota for 1933, and in any and all acts amendatory of said laws or any of them.

That for more than one year immediately preceding the date of the first publication of said legal advertisement, and ever since said time, said newspaper has been continuously and still is:

1. Printed in the English language from its known office of publication in said Village of Grand Marais, from which it purports to be issued, and in column and sheet form equivalent in space to at least four pages with five columns to the page, each seventeen and three-fourths inches long.

2. Issued once a week from a known office established in such place for publication and equipped with skilled work-

men and the necessary material for preparing and printing the same, in which all the presswork is done.

3. [Complied], printed, published and issued so that in its makeup twenty-five percent of its news columns at all times have been and still are devoted to local news of interest to the community which it purports to serve; so that it has also contained and does contain general news, comment and miscellany; and so that it has never wholly duplicated any other publication, and has never been entirely made up of patents, plate matter and advertisements, or any of them.

4. Circulated in and near, its place of publication, to the extent of at least 240 copies regularly delivered to paying subscribers, and duly entered as second class matter at its local post office at Grand Marais, Minnesota.

That long prior to the date of the first publication of said legal advertisement, there was filed with the County Auditor of said County of Cook, State of Minnesota, an affidavit of a person having knowledge of the facts, showing the name and location of said newspaper and the existence of the conditions constituting its qualifications as a legal newspaper, as required and set forth in the laws of the State of Minnesota hereinbefore cited.

That the following is a printed copy of the lower case alphabet from A to Z, both inclusive, which is hereby acknowledged as being the size and kind of type used in the composition and publication of said legal advertisement, viz.:

abcdefghijklmнопqrstuvwxyz—6 pt.

Further affiant saith not, save that this affidavit is made as proof of the publication of said legal advertisement and [fol. 40] as evidence of all the facts therein set forth, as provided by the laws of the State of Minnesota, and particularly as provided in Sections 9237, 9859, 9860 and 10936, Mason's Minnesota Statutes of 1927, and Acts amendatory thereof and supplementary thereto.

Leroy Raff.

Subscribed and sworn to before me this 8th day of April 1936. E. F. Lindquist, Clerk of District Court, Cook County, Minn. (Seal of Dist. Ct., Cook Co., Minn.)

Clerk's certificate to foregoing paper omitted in printing.
[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA,
FIFTH DIVISION

No. 1789. Law

STATE OF MINNESOTA, by its Attorney General, Petitioner,
vs.

PAUL QUODONCE et al., Respondents

Bill of Exceptions—Filed April 17, 1937

The above entitled matter came on for hearing at a regular term of the above named court in the Federal Building in the city of Duluth, state and district of Minnesota, on the 16th day of September, 1936, before the Honorable [fol. 41] Robert C. Bell, Judge, presiding; Mr. Ordner T. Bundlie, Assistant Attorney General of the State of Minnesota and Mr. Bert McMullen, special counsel, appearing for and on behalf of the State of Minnesota; Mr. George F. Sullivan, United States Attorney and Mr. Lewis N. Evans, Assistant United States Attorney, appearing specially for and on behalf of the United States of America; and Mr. L. M. Hatlestad appearing for and on behalf of the Quetico-Superior Council.

Whereupon, the following proceedings were had, to-wit: The State of Minnesota presented its petition in condemnation in the above entitled cause. Thereupon the court's attention was called to the fact that notice of lis pendens was recorded on February 8, 1936, at Grand Marais, at 9 o'clock in the morning, recorded in Book 7 of Miscellaneous page 129. Thereupon the State of Minnesota offered and there was received in evidence, Petitioner's Exhibit 1, to-wit:

PETITIONER'S EXHIBIT 1

"Order No. 8754

"It is hereby ordered that the description of the center line of Constitutional Trunk Highway No. 1, now Trunk Highway No. 61, in Cook County, Minnesota, be made more specific and definite between the points hereinafter named and said center line is hereby located as follows:

"From a point on or near the west line of Government Lot 1, section 12, township 62 north, range 4 east, distant 795

feet south of the northwest corner thereof run northeasterly at an angle of $56^{\circ}30'$ with said west lot line for a distance of 1029.8 feet to a point in said Government Lot 1, which point is known as Engineer's Station 1663 plus 40.8 and is equal to Engineer's Station 1663 plus 40.8 on the center line of said Trunk Highway as described in Commissioner of Highways' Order No. 7994 on S. P. 1-47-2 and is the point of beginning of center line herein described; thence deflect to the right on a $0^{\circ}30'$ curve (delta angle $6^{\circ}47'$) for a distance of 1356.7 feet; thence on tangent to said curve for a distance of 5246.7 feet; thence deflect to the right on a $0^{\circ}30'$ curve (delta angle $6^{\circ}48'$) for a distance of 1360 feet; thence on tangent to said curve for a distance of 25.7 feet to a point on or near the west line of section 5, township 62 north, range 5 east, distant 150.9 feet north of the west quarter corner thereof; thence continue northeasterly along last above described course for a distance of 1461.9 feet; thence [fol. 42] deflect to the right on a $1^{\circ}46'$ curve (delta angle $15^{\circ}34'$) for a distance of 881.1 feet; thence on tangent to said curve for a distance of 386.3 feet to a point on or near the north and south quarter line of said section 5, distant 1930 feet south of the north quarter corner thereof; thence continue northeasterly along last above described course at an angle of $89^{\circ}30'$ with said quarter line for a distance of 937.3 feet; thence deflect to the left on a $2^{\circ}00'$ curve (delta angle $37^{\circ}20'$) for a distance of 1866.7 feet; thence on tangent to said curve for a distance of 860.5 feet; thence deflect to the right on a $1^{\circ}00'$ curve (delta angle $24^{\circ}56'$) for a distance of 2493.3 feet; thence on tangent to said curve and run northeasterly along a line which would intersect a point on or near the west line of section 34, township 63 north, range 5 east, distant 111 feet north of the meander corner on the north shore of Lake Superior for a distance of 2324.2 feet; thence deflect to the left on a $0^{\circ}42'$ curve (delta angle $6^{\circ}00'$) for a distance of 857.1 feet; thence on tangent to said curve for a distance of 928.2 feet; thence deflect to the left on a $2^{\circ}30'$ curve (delta angle $33^{\circ}48'$) for a distance of 1352 feet; thence on tangent to said curve for a distance of 507.1 feet; thence deflect to the right on a $2^{\circ}12'$ curve (delta angle $18^{\circ}44'$) for a distance of 851.5 feet; thence on tangent to said curve for a distance of 697 feet; thence deflect to the left on a $1^{\circ}30'$ curve (delta angle $15^{\circ}30'$) for a distance of 1033.3 feet; thence on tangent to said curve

for a distance of 453.8 feet to a point on or near the west line of section 35, township 63 north, range 5 east, distant 1128 feet south of the northwest corner thereof; thence continue northeasterly along last above described course for a distance of 93.5 feet; thence deflect to the right on a $1^{\circ}45'$ curve (delta angle $59^{\circ}21'$) for a distance of 2248.6 feet; thence on tangent to said curve for a distance of 1551.8 feet; thence deflect to the left on a $1^{\circ}30'$ curve (delta angle $33^{\circ}42'$) for a distance of 2246.7 feet; thence on tangent to said curve for a distance of 1867.3 feet to a point on or near the east and west quarter line of section 25, township 63 north, range 5 east, distant 603 feet west of the meander corner on the north shore of Lake Superior; thence continue northeasterly along last above described course for a distance of 5175.3 feet to a point on or near the west line of section 19, township 63 north, range 6 east, distant 864.3 feet north of the southwest corner thereof; thence continue northeasterly along last above described course at an angle of $44^{\circ}24'$ with said west section line for a distance of 2531.6 feet to a point on or near the east and west quarter line of said section 19 distant 1771.7 feet east of the west quarter corner thereof; thence continue northeasterly along last [fol. 43] above described course at an angle of $44^{\circ}01'$ with said east and west quarter line for a distance of 82.9 feet; thence deflect to the right on a $1^{\circ}00'$ curve (delta angle $10^{\circ}00'$) for a distance of 1000 feet; thence on tangent to said curve and run northeasterly along a line which would intersect a point on or near the east line of said section 19 distant 225.3 feet south of the northeast corner thereof for a distance of 2498.7 feet; thence deflect to the left on a $1^{\circ}00'$ curve (delta angle $14^{\circ}00'$) for a distance of 1400 feet; thence on tangent to said curve for a distance of 3127.1 feet to a point on or near the north and south quarter line of section 17, township 63 north, range 6 east, distant 1284.5 feet south of the northwest corner of Government Lot 2, said section 17; thence continue northeasterly along last above described course at an angle of $41^{\circ}57'$ with said west lot line for a distance of 2042.2 feet to a point in the north half of the northeast quarter of said section 17, which point is known as Engineer's Station 2183 plus 80.8.

Portion of S. P. 61-1-47-2 & 3, Cook County.

Dated February 15, 1934.

N. W. Elsberg, Commissioner of Highways.

STATE OF MINNESOTA,
County of Ramsey:

I, N. W. Elsberg, Commissioner of Highways of the State of Minnesota, do hereby certify that I have compared the above and foregoing copy of order No. 8754 with the original thereof on file in my office and in my custody, and the foregoing is a true and correct copy thereof and transcript therefrom.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of St. Paul, Minnesota, this — day of — 193—.

(Signed) N. W. Elsberg, Commissioner of Highways."

The State of Minnesota then offered and there was received in evidence, Petitioner's Exhibit 2, to-wit:

PETITIONER'S EXHIBIT 2

"Order No. 8755

"It is hereby ordered that the right of way upon Constitutional Trunk Highway No. 1, now Trunk Highway No. 61, in Cook County, Minnesota, as designated by Commissioner of [fol. 44] Highways' Order No. 8754, shall be 400 feet in width (being 200 feet wide on each side of the center line thereof) all as shown on right of way map thereof on file in the office of the Minnesota Highway Department, and beginning at Engineer's Station 1668 plus 77.6 and running thence in a general northeasterly direction.

Portion of S. P. 61-1-47-2 & 3, Cook County.

Dated February 15, 1934.

N. W. Elsberg, Commissioner of Highways.

STATE OF MINNESOTA,
County of Ramsey:

I, N. W. Elsberg, Commissioner of Highways of the State of Minnesota, do hereby certify that I have compared the above and foregoing copy of order No. 8755 with the original thereof on file in my office and in my custody, and the

foregoing is a true and correct copy thereof and transcript therefrom.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of St. Paul, Minnesota, this — day of — 193—.

(Signed) N. W. Eisberg, Commissioner of Highways.

The State of Minnesota then offered and there was received in evidence, Petitioner's Exhibit 3, to-wit:

PETITIONER'S EXHIBIT 3

"Order No. 9567

"It is hereby ordered that the right of way upon Constitutional Trunk Highway No. 1, now known as Trunk Highway No. 61, in Cook County, Minnesota, the center line of which has been definitely located and designated by Commissioner of Highways' Order No. 8754 and the width therefor by Order No. 8755; that the said Width Order No. 8755 shall be and is hereby supplemented, changed and modified to provide a right of way 500 feet in width, being 250 feet wide on each side of the center line of said Trunk Highway, between Engineer's Station 1663 plus 40.8 and Engineer's Station 1710 plus 20; Engineer's Station 1727 plus 90 and Engineer's Station 1747 plus 40; Engineer's Station 1799 plus 95 and Engineer's Station 1832 plus 00; Engineer's Station [fol. 45] 1845 plus 50 and Engineer's Station 1905 plus 30; Engineer's Station 1922 plus 55 and Engineer's Station 1970 plus 40; Engineer's Station 1982 plus 85 and Engineer's Station 2047 plus 10; and Engineer's Station 2090 plus 45 and Engineer's Station 2178 plus 35, except between the following named points along said center line, all as shown on the right of way map thereof on file in the office of the Minnesota Highway Department; the width of said right of way shall be as hereinafter set forth:

Width on right side of center line	:	Width on left side of center line
--	---	---

Sta. 1699 plus 00 to Sta. 1710 plus 20

250 feet
to the south line of Gov't.
Lot 5, Sec. 6, Twp. 62N.
Rge. 5 E. and 200 feet in
said Gov't. Lot 5, Sec. 6.

Running thru—

250 feet Gov't. Lots 5 and 6, Sec. 6, Twp.
to the 62N. Rge. 5E.
south
line of
Gov't. Lot 5, Sec. 6, Twp. 62N. Rge. 5E.
and 200 feet in said Gov't. Lot 5, Sec. 6.

Width on right side of center line : Width on left side of center line

Running thru—

Sta. 1727 plus 90 to Sta. 1747 plus 40

200 feet
to the west line of Gov't.
Lot 8, Sec. 6, Twp. 62N.
Rge. 5E., 250 feet thru said
Gov't. Lot 8, Sec. 6, and
200 feet in Gov't. Lot 5,
Sec. 5, Twp. 62N. Rge. 5E.

200 feet Gov't. Lot 8, Sec. 6, Twp. 62N.
to the west NW $\frac{1}{4}$ of SE $\frac{1}{4}$, Sec. 6, Twp. 62N.
line of Rge. 5E.
Gov't. SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 6, Twp. 62N.
Lot 8, Rge. 5E.
Sec. 6, SW $\frac{1}{4}$ of NW $\frac{1}{4}$, Sec. 5, Twp. 62N.
Twp. Rge. 5E.
62N., Gov't. Lot 5, Sec. 5, Twp. 62N.
Rge. 5E.
5E., and 250 feet thru Gov't. Lot 8 and the
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Sec. 6 and 200 feet in
the SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 5, Twp. 62N.
Rge. 5E.

Sta. 1799 plus 95 to Sta. 1832 plus 00

200 feet
to the west line of Sec. 4/
Twp. 62N. Rge. 5E., 250
feet to the north and south
quarter lines of Sec. 4,
Twp. 62N. Rge. 5E. and
Sec. 33, Twp. 63N. Rge.
5E. and 200 feet in Gov't.
lot 3, said Sec. 33.

200 feet NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 5, Twp. 62N.
to the west Rge. 5E.
line of Gov't. Lot 8, Sec. 5, Twp. 62N.
Sec. 4, Rge. 5E.
Twp. Gov't. Lots 2 and 3, Sec. 4, Twp.
62N. Rge. 5E.
62N., Gov't. Lots 2 and 3, Sec. 33,
Rge. 5E Twp. 63N. Rge. 5E
250 feet
to the north line of said Sec. 4 and 200 feet in
Sec. 33, Twp. 63 N. Rge. 5E.

[fol. 46]

Sta. 1845 plus 50 to Sta. 1905 plus 30

200 feet
to the west line of Gov't.
Lot 4, Sec. 33, Twp. 63N.
Rge. 5E., 250 feet thru said
Gov't. Lot 4, Sec. 33 and
thru Gov't. Lots 2, 3, 4
and 5, Sec. 34, Twp. 63N.
Rge. 5E. and 200 feet in the
SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of said
Sec. 34.

200 feet Gov't. Lots 3 and 4, Sec. 33,
to the Twp. 63N. Rge. 5E.
west Gov't. Lots 2, 3, 4 and 5, Sec. 34,
Line of Twp. 63N. Rge. 5E.
Gov't. SW $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 34, Twp.
Lot 4, 63N. Rge. 5E.
Sec. 33, Twp. 63N. Rge. 5E.; 250 feet thru said
Twp. Gov't. lot 4, Sec. 33 and thru Gov't. Lots
2, 3, 4 and 5, Sec. 34, Twp. 63N. Rge. 5E.
and 200 feet in the SW $\frac{1}{4}$ of NE $\frac{1}{4}$, of said
Sec. 34.

Sta. 1922 plus 55 to Sta. 1970 plus 40

200 feet
to the west line of Sec. 35,
Twp. 63N. Rge. 5E., 250
feet thru Gov't. lots 2 and
3 and NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of
said Sec. 35 and thru the
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of
SE $\frac{1}{4}$, Sec. 26, Twp. 63N.
Rge. 5E. and 200 feet in
Gov't. Lot 1, said Sec. 26.

200 feet NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 34, Twp.
to the 63N. Rge. 5E.
west Gov't. Lot 1, Sec. 34, Twp. 63N.
line of Rge. 5 E.
Sec. 35, NW $\frac{1}{4}$ of NW $\frac{1}{4}$, Sec. 35, Twp.
Twp. 63N. Rge. 5. E.
63 N. Gov't. Lots 2 and 3, Sec. 35,
Rge. Twp. 63N. Rge. 5E.
5E., S $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 26, Twp. 63N.
250 feet Rge. 5E.
thru SW $\frac{1}{4}$ of SE $\frac{1}{4}$, Sec. 26, Twp.
said 63 N. Rge. 5E.
Sec. 35. Gov't. Lot 1, Sec. 26, Twp. 63N.
and Rge. 5E.
thru the S $\frac{1}{4}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of SE $\frac{1}{4}$,
Sec. 26, Twp. 63N. Rge. 5E. and 200 feet
in Gov't. Lot 1, said Sec. 26.

Width on : Width on
right side of : left side of
center line : center line

Sta. 1982 plus 85 to Sta. 2033 plus 00
200 feet
to the west line of Gov't.
Lot 6, Sec. 25, Twp. 63N.
Rge. 5E. and 200 feet in
Gov't. Lots 2, 3, 4, 5 and
6, of said Sec. 25.

Running thre-
200 feet NE $\frac{1}{4}$ of SE $\frac{1}{4}$, Sec. 26, Twp.
to the 63N. Rge. 5E.
west Gov't. Lot 1, Sec. 26, Twp. 63N.
line of Rge. 5E.
Gov't. NW $\frac{1}{4}$ of NW $\frac{1}{4}$, Sec. 25, Twp.
Lot 5, 63N. Rge. 5E.
Sec. 25, Gov't. Lots 2 to 6 inclusive,
Twp. 63N. Rge. 5E.
63N.,

Rge. 5E. and 200 feet in the SW $\frac{1}{4}$ of
NW $\frac{1}{4}$ and Gov't. Lots 2, 3, 4, 5 and 6,
in said Sec. 25.

[fol. 47]

Sta. 2033 plus 00 to Sta. 2047 plus 10
200 feet
to the south line of Sec. 24,
Twp. 63N. Rge. 5E. and
200 feet in the SE $\frac{1}{4}$ of
SE $\frac{1}{4}$, of said Sec. 24.
Excepting therefrom that
portion of Gov't. Lot 1,
Sec. 25, Twp. 63N., Rge.
5E. lying southerly of a
line run east from a point
on the west line of Gov't.
Lot 1, said Sec. 25 distant
521.7 feet north of the
southwest corner thereof.

400 feet Gov't. Lots 1 and 2, Sec. 25,
to the Twp. 63N. Rge. 5E.
south SE $\frac{1}{4}$ of SE $\frac{1}{4}$, Sec. 24, Twp. 63N.
line of Rge. 5E.
Sec. 24,

Twp. 63N. Rge. 5E. and 200 feet in the
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of said Sec. 24.

Sta. 2090 plus 45 to Sta. 2109 plus 70
200 feet
to the west line of Gov't.
Lot 2, Sec. 19, Twp. 63N.
Rge. 5E. and all that portion
of Gov't. Lots 1 and 2
and NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of said
Sec. 19 lying southeasterly
of the center line of said
Trunk Highway.

200 feet Gov't. Lots 1, 2 and 3, Sec. 19,
to the Twp. 63N. Rge. 5E.
west NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 19, Twp.
line of 63N. Rge. 5E.
Gov't.
Lot 2, Sec. 19, Twp. 63N. Rge. 5E. and 250
feet in Gov't. Lots 1 and 2 and the NW $\frac{1}{4}$
of NE $\frac{1}{4}$ of said Sec. 19.

Sta. 2124 plus 05 to Sta. 3126 plus 60
250 feet

All that Gov't. Lot 1, Sec. 19, Twp. 63N.
portion Rge. 5E.
of Gov't. Lot 1, Sec. 20, Twp. 63N.
Gov't. Rge. 5E.
Lot 1 Gov't. Lot 4, Sec. 17, Twp.
Sec. 19, 63N. Rge. 5E.
Gov't.
Lot 1
Sec. 20 and Gov't. Lot 4, Sec. 17, all in
Twp. 63N. Rge. 5E. lying northwesterly
of the center line of said Trunk Highway.

Portion of S. P. 61-1-47-3,
Cook County,
Dated April 2, 1935.

N. W. ELSBERG,
Commissioner of Highways.

[fol. 48] STATE OF MINNESOTA,
County of Ramsey.

I, N. W. Elsberg, Commissioner of Highways of the State of Minnesota, do hereby certify that I have compared the above and foregoing copy of order No. 9567 with the original thereof on file in my office and in my custody, and the foregoing is a true and correct copy thereof and transcript therefrom.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of St. Paul, Minnesota, this — day of — 193—.

(Signed) N. W. Elsberg.

MEMORANDUM AS TO PETITIONER'S EXHIBIT 4

Thereupon the State of Minnesota offered and there was received in evidence, Petitioner's Exhibit 4, which is described as follows: A large blueprint map prepared by the State of Minnesota, Department of Highways, designated as Right-of-Way Map, Cook County, Reservation River to one and one-half miles west of Grand Portage, showing thereon parts of Sections 4, 5 and 6 in Township 62 North, Range 5 East of the 4th Principal Meridian; Sections 25, 26, 33, 34 and 35 in Township 63 North, Range 5 East, and Sections 17, 18, 19 and 20 in Township 63 North, Range 6 East of the 4th Principal Meridian; and also showing thereon the location of the proposed Trunk Highway No. 61 as described in Petitioner's Exhibits 1, 2 and 3.

MOTION FOR APPOINTMENT OF APPRAISERS, ETC.

The State of Minnesota rested and moved for the allowance of the petition and for the appointment of three appraisers, residents of Cook County, for the purpose of appraising the land and making a report to the Court of their awards in the manner prescribed by law, and that the Court set a time and place for the qualification of the commissioners.

MOTION TO DISMISS

The United States appeared specially in this matter for the sole purpose of making certain motions, and by its attorney stated it did not intend to subject itself to the general jurisdiction of the Court in this matter, and upon such special appearance moved that this action be dismissed on

the ground that the Court has no jurisdiction of the subject matter of the action, or the parties thereto, for the following reasons:

First: That this is a suit against the United States and the United States has not given its consent thereto.

Secondly: That the District Court of the State of Minnesota, in the first instance, had no jurisdiction of this action [fol. 49] or over the United States, and the removal to this Court will vest no jurisdiction in this Court.

Thirdly. That the United States has not been served with process in the manner prescribed by law.

Furthermore, the United States, appearing specially as aforesaid, moved that this action be dismissed with particular reference to the tract referred to in the petition of the State as Parcel 5, being a part of Lot 5 and a part of the Southwest Quarter of the Northwest Quarter, in Section 5, Township 62 North of Range 5, East of the 4th Principal Meridian, and more particularly described in petition of the State for the same reasons before stated. In support of this second motion, the United States offered and there was received in evidence, Government's Exhibit 1, to-wit:

GOVERNMENT'S EXHIBIT 1

"United States Department of the Interior,
Office of Indian Affairs,
Washington

May 7, 1936.

"I, E. J. Armstrong, Assistant Finance Officer, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this Office.

In Testimony Whereof, I have hereunto subscribed my name, and cause the seal of this office to be affixed on the day and year first above written.

(Signed) E. J. Armstrong, Assistant Finance Officer."

"1-006

Oath of Disinterestedness

(Section 3745, U. S. Revised Statutes.)

"I do solemnly swear that the copy of contract hereunto annexed is an exact copy of contract made by me personally with Paul Quodance that I made the same fairly, without benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said Paul Quodance, or to other person; and that the papers accompanying include [L. 50] all those relating to the said contract, as required by the statute in such case made and provided.

(Signed) T. A. Walters, First Assistant Secretary,
RS Department of the Interior. D.L.K.

"Sworn to and subscribed before me, at Washington,
D. C., this twenty-first day of February, 1936.

(Signed) W. H. Reichart, Notary Public. My commission expires August 10, 1939."

"United States Department of the Interior

Office of Indian Affairs

OFFER TO SELL LANDS TO THE UNITED STATES

Date Jan. 22, 1936.

Allotment 38.

"To assist in the program of the United States to acquire lands under the Indian Reorganization Act of June 18, 1934 (3 Stat. 984), for Indian purposes, the undersigned owners of the following-described lands hereby offer to sell and convey to the United States of America the said lands in fee simple with all buildings and improvements thereon:

SW-NW, Lot 5, Section 5, Town 62, Range 5

Cook County, Minnesota

Allot.—38.

Tract.—302.

Option.—302.

In consideration of the examination and appraisal by the United States Government of the lands herein described

and other good and valuable considerations which are hereby acknowledged as received, the undersigned grant to the United States of America the option and right to purchase said lands, including improvements, at the rate of \$11.40 per acre estimated to contain 76.30 acres (or the sum of \$870.00 for the tract as a whole, including all improvements and appurtenant rights, including water); however, the exact acreage is to be determined by survey either upon the ground or from existing data.

The undersigned agree that the procedure and terms shall be as required by the Secretary of the Interior, and that the [fol. 51] conveyance is to be by warranty deed in the form, manner, and at the time desired by the said Secretary. All outstanding taxes, lines, and encumbrances, if any, are to be paid by the undersigned, including expenses incidental to the execution of the deed.

This offer is for acceptance by the United States through the Secretary of the Interior within six months from the date hereof.

After the acceptance of this option, the United States will purchase immediately a certificate or an abstract of title covering the said property; the vendor will obtain and record, without cost to the United States, such additional evidence of title as may be requested by the Secretary of the Interior, including the deed made pursuant hereto; and thereafter the United States will have the certificate or abstract extended to show indefeasible title vested in the United States, the cost of securing and having extended the certificate or abstract to be deducted from the purchase price payable to the vendor: Provided, That, if such certificate or abstract is not secured by the United States, the Secretary may, by written notice to the vendor at any time after acceptance of this offer, require the vendor to furnish, without cost to the United States, a complete abstract or an acceptable certificate of title covering the said property, to obtain and record additional evidence of title, and later to extend said abstract or certificate to embrace the additional data including the deed made pursuant hereto: Provided further, That if the vendor fails or refuses to furnish such an abstract or certificate within sixty days after the aforesaid notice, such abstract or certificate may be procured by the United States at the expense of the vendor and the cost thereof deducted from the purchase price of said property.

Should the operations of this option extend beyond the current fiscal year, it is understood that such option will then be contingent upon necessary appropriation by Congress of funds for expenditure hereunder after such current year has expired. In case such appropriation as may be necessary to carry out this option is not made, the vendor hereby releases the United States from all liability due to the failure of Congress to make such appropriation.

No member of or delegate to Congress shall be admitted to any share or part in this offer or option, nor to any benefit to arise thereupon.

(Signed) Mr. Paul Quodonce, Single.

Witnesses: Mrs. Julia O. Shughart, Mrs. Mary Ann Thibault.

[fol. 52] Department of the Interior,
Office of the Secretary,
Washington, D. C.

This option is hereby accepted this 20th day of Feb., 1936
subject to the conditions named therein.

(Signed) T. A. Walters, First Assistant Secretary.

Original.

Form SL No. 10
U. S. Department of Agriculture
Agricultural Adjustment Administration
Program Planning Division
Land Policy Section.

**Submarginal Land Program
Agricultural Demonstration Project**

Allotment No. 38 APPRAISAL REPORT
Tract no. 38 Project Grand Portage County Cook State Minn.
Field work by Pearson and Mayhew Title..... Date.....
Owner Paul Quodance Address.....
Acres claimed by owner 76.30 Acres (from ownership map) 76.30
Location SW-NW, Lot 5, Section 5, 62-5

I. Valuation of Land and Young Tree Growth

**Remarks
(Exceptional
factors
determining
appraised
price.)**

Class of Grade of Land	Appraised price Each grade	Acres— each grade	Total Appraised Price Dollars	factors determining appraised price.)
Crop land (including orchard and hay meadows).	Dollars			
Grade	x x x x x	x x x x x	.....	x x x x x k
Grasing or open pasture	x x x x x	x x x x x	.....	x x x x x x x
Grade				
Forest land (including woodland pasture)	x x x x x	x x x x x	.....	x x x x x x x
Grade	2.50	76.30	196.76	.....
Waste				
Total	x x x x x	x x x x x	196.75	.....

II. Valuation of Merchantable Timber

Product	Acres	Stand per Acre	Total Stand	Value Per Unit	Total Value
Total.....					

[fol. 53]

Form SL No. 10

Page 2.

III. Summary of Values for Tract

Items	Value per acre Dollars	Total Value Dollars
1. Land and young tree growth (crop, grazing, forest land).....		190.75
2. Timber (merchantable).....	x x x	
3. Improvements (Form S. L. No. 11).....	x x x	
4. Total value of tract.....		190.75
5. Deduction for inaccessibility (if any, explain below).....		
6. Deduction for reservations and exceptions (explain below).....		
7. Additions for accessibility, for potential values, etc. (explain below).....		
Lake frontage.....	2000 plus	1,000.00
8. Appraised fair purchase price (4 less 5 and 6 plus 7).	15.60	1,190.75

Price of tract given in proposal to sell: Per acre, \$11.40 Total, \$870.00.
 Remarks and Explanations.....

.....
 (Signed)..... Date.....

Chief Appraiser.

(Signed) CARL P. PEARSON Date 1-20-36
 Project Manager.

Accepted..... Date.....
 Regional Director.

Instructions

1. Land classes:

(a) Crop land (including orchard and hay meadow): Embraces land in tillage, orchards, permanent hay meadows (whether tillable or nontillable) and "Rotation" pasture.

(b) Grazing or open pasture; Embraces all nontimber land pastured (except crop land pastured in rotation) or suitable for pasture whether tillable or nontillable.

(c) Forest land (including woodland pasture): Embraces all land covered by timber growth whether pastured or unpastured.

(d) Waste land: Embraces all land not suitable for crops, pastures, or the production of commercial timber.

[fol. 54] 2. Land grades within the classes:

"Grades" within each class are to be determined and defined by the project staff in collaboration with such expert technical assistance as may be available (soils technicians, foresters, agronomists, etc.) "Grades" are to be defined so that they will best represent the conditions of the land found in the particular area where they are to be used. A single grade within a class designation may embrace topographic, productive, erosion, and soil cover factors. For example: Roman numerals may be used to designate topography as I for level upland, II for moderately steep hillside or steeply rolling, III for foot slopes, IV for level bottom lands or excessively rough land; letters may designate the class as C for crop land, P for pasture or grazing, F for forest, etc.; Arabic numerals may designate productivity as determined by soil type, erosion, tilth, nature of grass or forest cover, etc.

3. Base prices:

A base price per acre for each grade of land as defined will be determined by the project staff in collaboration with such experienced assistance as is available (better farmers, county agents, farm real-estate dealers, appraisers, etc.)

4. Appraised price:

The appraiser in assigning a value to a particular plot of land may vary his appraisal of its value from the base price for the grade within which the plot falls in proportion as he feels the character of the plot varies from the generalized description given the grade. He must give reasons in the appropriate column for such variation from the base price. For example: A plot (graded IC2, level upland, cropped, slightly eroded, and of less productive soil) may have been carefully farmed, fertilized and measures taken to stop the erosion; such a plot might be valued above the base price for the grade.

Form SL No. 12-B (Revised March 6, 1935).

U. S. Department of Agriculture.
Agricultural Adjustment Administration.
Program Planning Division.
Land Policy Section.

Tract 302.

Submarginal Land Program
Agricultural Demonstration Projects

Tract Map (With Grid)

[fol. 55]

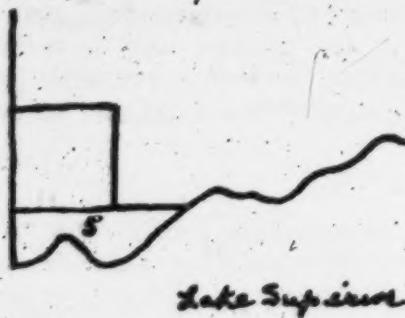
Name of owner Paul Quodance Allot—38

Name of project Proposal No.

Acres in tract 76.30 Field work by . Date

Description SW-NW Lot 5, 5-62-5

(Scale: 4 inches equals 1 mile)



Classes

Grades*

L Crop Land

E

G Pasture Land

E

N

D Forest Land

(Do Not Write In This Space)

5-183a

Department of The Interior

Office of Indian Affairs

DEED NONCOMPETENT INDIAN LANDS

This Indenture, Made and entered into this 2nd day of March one thousand nine hundred and Thirty Six, by and [fol. 56] between Paul Quodance (a single man) of 326 East First Street, Duluth, Minnesota, noncompetent Chippewa Indian, part . . . of the first part, and The United States of America in Trust for The Grand Portage Bank of Chippewa Indians of — — party of the second part:

Witnesseth, That said party of the first part, for and in consideration of the sum of Eight Hundred and Seventy and no One-Hundredths (\$870.00) dollars, in hand paid; the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto said party of the second part the following-described real estate and premises situated in Cook County, State of Minnesota to-wit: Government Lot No. Five (5), and The Southwest Quarter of The Northwest Quarter, (SW $\frac{1}{4}$ NW $\frac{1}{4}$), Section 5, town 62, Range 5, Containing Seventy-Six and Thirty Hundredths (76.30) Acres According to Government Survey Thereof, together with all the improvements thereon and the appurtenances thereto belonging. And the said party of the first part, for himself and his heirs, executors, and administrators, does hereby covenant, promise, and agree to and with the said party of the second part, its successors and assigns, that he will forever warrant and defend the said premises against the claim of all persons, claiming or to claim by, through or under himself only.

To have and to hold said described premises unto the said party of the second part, its successors and assigns, forever.

In Witness Whereof, The said party of the first part has hereunto set his hand and seal . . . the day and year first above written.

Paul Quodance . . . (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)

Witnesses: E. H. Whittaker. Wm. Shughart.

(Cover)

Noncompetent Indian Deed

from

Paul Quodance

to

United States of America in Trust for The Grand Portage
Bank of Chippewa Indians[fol. 57] — of —,
— County, ss:This instrument was filed for record on the — day of
—, 19, at — o'clock N., and duly recorded in Book —,
on page —.

— — — — —, Register of Deeds.

5-183a

Department of The Interior

Office of Indian Affairs

March 12 1936

The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved.

William Zimmerman, Jr., Assistant Commissioner.

Department Of The Interior

March 14 1936

The within deed is hereby approved.

T. A. Walters, First Assistant Secretary.

Office Of Indian Affairs

Land Division

March 23, 1936

Recorded in Deed Book —, Indian Lands, Vol. 1, page 1.

Acknowledgments must be in accordance with the forms prescribed by the State in which the land is situated.

STATE OF MINN.,

County of St. Louis, ss:

Be It Remembered, That on this 2 day of March, A. D. 1936 before the undersigned, a Notary Public, in and for the County and State aforesaid, personally appeared Paul [fol. 58] Quodance to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the execution of the same.

In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last-
above written.

(Signed) M. B. Butler, Notary Public.

My commission expires Jan. 3, 1943.

Thereupon the United States rested and no further proceedings were had save and except that the Quetico-Superior Council was granted leave to appear and file a brief as Amicus Curiae. The matter was then taken under advisement by the Court, with the understanding that to the order subsequently to be entered, the party affected thereby adversely would have an exception allowed to all or any part of such order.

Thereupon on the 23rd day of December, 1936, the above entitled court made, declared, entered and filed its order as follows:

ORDER DENYING MOTION OF UNITED STATES TO DISMISS, ETC.

"The above-entitled cause came duly on for hearing before the Court and the Honorable Robert C. Bell, one of

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TRADE MARK

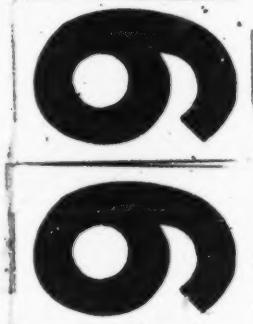
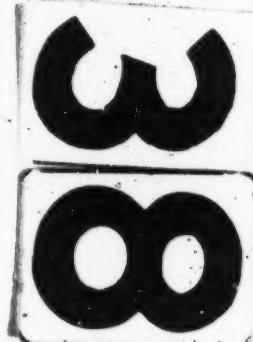


22



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the judges thereof, in the Federal Building at Duluth, St. Louis County, Minnesota, on September 16, 1936, at 10:00 o'clock A. M., at which time the petition herein was duly presented to the Court after this proceeding had been duly removed from the District Court, Eleventh Judicial District, Cook County, Minnesota.

"The petitioner appeared by Ordner T. Bundlie, Deputy Attorney General and Bert McMullen, Special Counsel of the State of Minnesota. George F. Sullivan, United States Attorney for the District of Minnesota, and his assistant, Lewis N. Evans, appeared generally for the Indian respondents, and made special appearance for the United States Government for the express purpose of objecting to the jurisdiction of the Court; and L. M. Hatlestad appeared for and on behalf of the Quetico-Superior Committee, not a respondent herein.

"At the opening of the said hearing Mr. Lewis N. Evans, Assistant United States Attorney for the District of Minnesota, appearing specially in this matter for the United States Government for the sole purpose of making certain [fol 59] motions and advising the Court that the United States Government did not intend to subject itself to the general jurisdiction of the Court in this matter, moved the Court to dismiss said suit upon the following grounds:

"That said suit was a suit against the United States and that the United States had not given its consent thereto; that the Court of the State of Minnesota in the first instance had no jurisdiction in said action over the United States, and that the removal of said suit from the State Court to this Court would vest no jurisdiction in this Court; and, further, that the United States had not been served with process in this matter in the manner and form prescribed by law; and moved that said action be dismissed with particular reference to the tract described in the petition of the State of Minnesota as Parcel No. 5;

"The Court took said motion under advisement and proceeded, at said time, to hear said suit, and upon a consideration of said motion of the United States, said motion is in all things denied and the United States is given an exception from said ruling of this Court.

JUDGMENT

"Thereupon the petition herein was duly presented to the Court and the petitioner proceeded to offer testimony thereon, and the Court having heard the evidence adduced by the parties and the arguments of counsel, and after due consideration of the written briefs submitted by the respective counsel, the Court finds as follows:

I

"That, except as hereinafter qualified, all of the facts stated in the petition are true as therein stated;

II

"That the consent of the United States to bring these proceedings against Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 United States Code Annotated, Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings;

III

"That the lands sought to be taken in this proceeding are situated in Cook County, Minnesota, and are described as follows, and the names of all persons interested in each of the said parcels of land, together with the nature of their interests, are hereinafter set forth immediately following the description of each of said parcels.

[fol. 60] **Parcel 5 (61-1-47-3)-**

All that part of the two following described tracts:

1. Government Lot 5 of section 5, township 62 north, range 5 east;

2. Southwest quarter of the northwest quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said

west section line for a distance of 1461.9 feet and there terminating;

containing 12.79 acres, more or less.

Names of persons interested in said Parcel 5 and nature of interest:

Name	Nature of Interest
Paul Quodonce	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

Parcel 6 (61-1-47-3)

All that part of the following described tract:

Government Lot 6 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 5, distant 150.9 feet north of the west quarter corner thereof; thence run northeasterly at an angle of 72°08' with said west section line for a distance of 1461.9 feet; thence deflect to the right on a 1°46' curve, delta angle 15°34', for a distance of 881.1 feet; thence on tangent to said curve for a distance of 500 feet and there terminating;

containing 12.32 acres, more or less.

[fol. 61] Names of persons interested in said Parcel 6 and nature of interest:

Name	Nature of Interest
Me Shaix	Owner under Indian Allotment
Unknown heirs of Me Shaix, deceased;	Claimants of an interest
Nancy McMillan Penay see))

Name	Nature of Interest
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent

United States of America	Holder of Fee in Trust
--------------------------	------------------------

Parcel 7 (61-1-47-3)

All that part of the following described tract:

Government Lots 7 and 8 of section 5, township 62 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said Government Lot 7, distant 612 feet south of the northwest corner thereof; thence run northeasterly at an angle of $89^{\circ}30'$ with the west line thereof; for a distance of 937.3 feet; thence deflect to the left on a $2^{\circ}00'$ curve, delta angle $37^{\circ}20'$, for a distance of 1866.7 feet; thence on tangent to said curve for a distance of 200 feet and there terminating;

containing 24.38 acres, more or less.

Names of persons interested in said Parcel 7 and nature of interest:

Name	Nature of Interest
Louise May-maush-kaw-aush)
Edward Plante)
Louise Plante)
Theodore Plante)
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
Unknown heirs of Louise May-maush-kaw-aush	Claimants of an interest
The United States of America	Holder of Fee in Trust

[fol. 62]

Parcel 11 (61-1-47-3)-

All that part of the following described tract:

Government Lot 3 of section 33, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east line of said Government Lot 3, distant 536 feet north of the southeast corner thereof; thence run southwesterly at an angle of $77^{\circ}20'$ with the east line thereof for a distance of 1065.2 feet; thence deflect to the left on a $1^{\circ}00'$ curve, delta angle $24^{\circ}56'$, for a distance of 500 feet and there terminating;

containing 12.57 acres, more or less.

Names of persons interested in said Parcel 11 and nature of interest:

Name	Nature of Interest
Narcisse Weesh-koob)	
Joseph Weesh-koob)	
Cecilia Weesh-koob Boar-)	Owners under Indian Allot-
grease)	ment
Catherine Scott (Mrs.)	
Amyotto)	
Unknown heirs of)	
Narcisse Weesh-koob, de-)	
ceased;)	
Unknown heirs of)	Claimants of an interest
Catherine Scott (Mrs.)	
Amyotte,) deceased;)	
Mel. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disburs- ing Agent
The United States of America	Holder of Fee in Trust

Parcel 15 (61-1-47-3)-

All that part of the following described tract:

Southwest quarter of the northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) of section 34, township 63 north, range 5 east;

[fol. 63] which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the east line of said section 34, distant 1128 feet south of the northeast corner thereof; thence run southwesterly at an angle of $40^{\circ}20'$ with said east section line for a distance of 453.8 feet; thence deflect to the right on a $1^{\circ}30'$ curve, delta angle $15^{\circ}30'$ for a distance of 1033.3 feet; thence on tangent to said curve for a distance of 697 feet; thence deflect to the left on a $2^{\circ}12'$ curve, delta angle $18^{\circ}44'$, for a distance of 600 feet and there terminating;
containing 5.34 acres, more or less.

Names of persons interested in said Parcel 15 and nature of interest:

Name	Nature of Interest
Narcisse Weesh-knob	
Joseph Weesh-koob)
Cecilia Weesh-koob Bear-grease	) Owners under Indian Allotment
Catherine Scott (Mrs. Amyotte))
Unknown heirs of Narcisse Weesh-koob, deceased)
Unknown heirs of Catherine Scott (Mrs. Amyotte,) deceased;)
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
The United States of America	Holder of Fee in Trust

Parcel 20 (61-1-47-3)-

All that part of the two following described tracts:

1. Government Lot 1 of section 26, township 63 north, range 5 east;

2. Northeast quarter of the southeast quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 26, township 63 north, range 5 east; which lies within a distance of 200 feet on each side of the following described line:

[fol. 64] Beginning at a point on the east and west quarter line of section 25, township 63 north, range 5 east, distant 1497 feet east of the west quarter corner thereof; thence run southwesterly at an angle of 44°00' with said east and west quarter line for a distance of 1867.3 feet; thence deflect to the right on a 1°30' curve, delta angle 33°42', for a distance of 2000 feet and there terminating:

containing 14.10 acres, more or less.

Names of persons interested in said Parcel 20 and nature of interest:

Name	Nature of Interest
Josetta Frost	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
The United States of America	Holder of Fee in Trust

Parcel 23 (61-1-47-3)

All that part of the following described tract:

Southeast quarter of the southeast quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of section 24, township 63 north, range 5 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the south line of said section 24, distant 872 feet west of the southeast corner thereof; thence run northeasterly at an angle of 43°40' with said south section line for a distance of 1500 feet and there terminating; excepting therefrom the right of way of existing highway; containing 11.43 acres, more or less.

Names of persons interested in said Parcel 23 and nature of interest:

[fol. 65]

Name	Nature of Interest
John Caribo (May-ah-o-say)	Owner under Indian Allotment
Sah-gah-sheak)	
John Mitchell)	
Unknown heirs of)	
John Mitchell, deceased;)	Claimants of an interest
Unknown heirs of)	
John Caribo, deceased;)	
Mary Mitchell)	
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minn. and Special Disbursing Agent.
The United States of America	Holder of Fee in Trust

Parcel 24 (61-1-47-3)-

All that part of the two following described tracts:

1. Government Lots 4 and 5 of section 19, township 63 north, range 6 east;
2. Northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of section 19, township 63 north, range 6 east;

which lies within a distance of 200 feet on each side of the following described line:

Beginning at a point on the west line of said section 19, distant 1759.6 feet south of the west quarter corner thereof; thence run northeasterly at an angle of 44° 24' with said west section line for a distance of 2614.5 feet; thence deflect to the right on a 1° 00' curve, delta angle 10° 00', for a distance of 200 feet and there terminating;

containing 23.29 acres, more or less.

Names of persons interested in said Parcel 24 and nature of interest:

[fol. 66]

Name /	Nature of Interest
Sah-man-equay-ga-bo	Owner under Indian Allotment
Joseph Long Body (O tah) tah gay))
Unknown heirs of Joseph Long Body deceased;)
Joseph Long Body, Jr.)
Ah-zha-day-gwam-a beke, (Mrs. John Zimmerman))
William Howensten)
Unknown heirs of William Howensten,)
deceased;)
Annie Howensten)
Unknown heirs of Annie Howensten,)
deceased;)
M. L. Burns	Claimants of an interest
The United States of America	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Min- nesota, and Special Disburs- ing Agent

Holder of fee in trust

Parcel 25 (61-1-47-3)

All that part of the following described tract:

Government Lot 3 of section 19, township 63 north, range
6 east;which lies within a distance of 200 feet on each side of the
following described line:

Beginning at a point on the west line of said section 19,
distant 1759.6 feet south of the west quarter corner thereof;
thence run northeasterly at an angle of $44^{\circ}24'$ with said west
section line for a distance of 2614.5 feet; thence deflect to
the right on a $1^{\circ}00'$ curve, delta angle $10^{\circ}00'$, for a distance
of 1000 feet; thence on tangent to said curve for a distance
of 200 feet and there terminating;

containing 9.45 acres, more or less.

Names of persons interested in said Parcel 25 and nature of interest:

[fol. 67]

Name	Nature of Interest
Nancy Thomas (Hunter)	Owner under Indian Allotment
M. L. Burns	As Superintendent of the Consolidated Chippewa Agency at Cass Lake, Minnesota, and Special Disbursing Agent
United States of America	Holder of Fee in Trust

IV

"That the use for which said lands are proposed to be taken is a public use and said taking is authorized by law;

V

"That on March 12, 1936, Paul Quodonce executed a certain deed purporting to convey to the United States, in trust for the Grand Portage Band of Chippewa Indians, all of his right, title and interest in and to Parcel 5 above described; that the said conveyance was made subsequent to the filing of a Notice of Lis Pendens in the above entitled matter by the State of Minnesota and with notice of the pendency of this action, and that the said conveyance is void insofar as it affects the right of the State of Minnesota to proceed in this action, and the estate vested in the United States of America by the said conveyance is subject to the easement herein acquired by the State of Minnesota;

VI

"That the District Court of the State of Minnesota for the Eleventh Judicial District, Cook County, Minnesota, had jurisdiction of the above entitled action, and the said jurisdiction became vested in this Court by removal hereto.

"It Is Hereby Ordered That the petition of the State of Minnesota be, and the same hereby is, granted.

"It Is Further Ordered That Andrew Hedstrom, George Mayhew and Ed Toftey with Carl M. Sound and L. F. Lien as alternates, who are disinterested persons and residents of said county, be and they hereby are appointed commissioners to ascertain and report the amount of damages that will be sustained by the several owners of said lands on account of said taking; that said commissioners hold their first meeting in the office of the clerk of district court in the court house in Grand Marais, Minnesota, at two o'clock P. M., on Wednesday, the 3rd day of February, 1937; and [fol. 68] that the compensation of each of said commissioners be the sum of Ten Dollars (\$10.00) per day for each and every day occupied by them in the performance of their duties as such.

"It Is Further Ordered That the estate acquired by the petitioner in said lands shall be an easement for highway purposes, and that the several owners of said lands shall retain therein all the rights and privileges which appertain to ownership of the fee in said lands except as hereinafter provided, and subject and in subordination to the use of said lands as a public highway; but said petitioner shall not acquire any right in or to any buildings or structures on said premises, such buildings and structures to remain the property of the owner. the fee and to be moved off the right of way of said trunk highway in such manner and at such time as may be determined in these proceedings; and that the petitioner shall have the right to construct and maintain such temporary snow fences upon the tracts and parcels of land herein described and upon the lands adjacent thereto, as provided by law, and that the petitioner shall have the exclusive control and regulation of the culture and cutting of all grasses, shrubs, trees, and natural growth now existing on the lands being acquired herein and the planting of any grasses, shrubs and trees thereon.

"It Is Further Ordered That the United States of America be accorded an exception to each and all of the findings of the Court in this matter.

"Dated at Duluth, Minnesota, this 23 day of December, 1936.

By the Court.

Robert C. Bell, Judge, U. S. District Court."

IN UNITED STATES DISTRICT COURT**STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS**

It is hereby stipulated and agreed, by and between the undersigned attorneys for the parties hereto, that in the foregoing the description of Petitioner's Exhibit 4 therein contained may be substituted for and in lieu of the original exhibit for the purposes of appeal to the United States Circuit Court of Appeals.

It is further stipulated that the foregoing statement of the evidence and proceeding upon the hearing on the presentation of the petition of the State of Minnesota in the [fol. 69] above entitled cause, consisting of 27 pages, be accepted, settled and allowed as a Bill of Exceptions or settled case, in the above entitled cause on appeal, composing all of the evidence offered and received of the proceedings, motions, requests and all objections, rulings and exceptions made, taken and granted at the said hearing, without further or other notice to any of the parties herein, and that an order may be made and entered by the Court in accordance herewith without any other or further proceedings.

Dated this 15th day of April, A. D. 1937.

George F. Sullivan, United States Attorney for the District of Minnesota. Ordner T. Bundlie, Assistant Attorney General, State of Minnesota.

IN UNITED STATES DISTRICT COURT**ORDER OF PROVING BILL OF EXCEPTIONS**

Pursuant to the within Stipulation, heretofore entered into between the United States of America and the State of Minnesota,

It Is Hereby Ordered That the foregoing statement, consisting of 27 pages, be and the same is hereby settled and allowed as the Bill of Exceptions or settled case in the above entitled cause on appeal, composing all of the evidence offered and received of the proceedings, motions, requests and all objections, rulings and exceptions made, taken and

granted at the said hearing, without further or other notice to any of the parties herein.

Dated this 15 day of April, A. D. 1937.

By the Court.

Robert C. Bell, Judge, U. S. District Court.

[File endorsement omitted.]

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 18, 1937

The United States of America, one of the respondents in the above entitled action, considering itself aggrieved by the order of the above named court, entered in the above entitled cause on the 23d day of December, 1936, and desiring to appeal from said order in said cause to the United States Circuit Court of Appeals for the Eighth Circuit, presents herewith its Notice of Appeal and Assignments of Error, no bond on appeal being required of Respondent under Section 1001 of the Revised Statutes of the United States (28 U. S. C. 870), this appeal being taken by the United States by the direction of the Attorney General of the United States as appears from the communication hereto attached and made a part hereof, and the respondent United States of America prays for an order of this court allowing said appeal and for a citation directed to the petitioner State of Minnesota, requiring it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, within forty (40) days from and after the date of said citation pursuant to said appeal.

United States of America, by George F. Sullivan,
United States Attorney for the District of Minnesota,
and Attorney for Respondent United States
of America.

Signal Corps, United States Army

Received at

11 WVU B 37 JUS 1 Extra Priority.

Washington, D. C., 1259P. March 16, 1937.

U. S. Attorney, St. Paul, Minn.:

Appeal in State of Minnesota Versus Quodonce Etal in
Order to Protect Rights of Government Pending Decision
Solicitor General Stop Should He Not Authorize Prosecu-
[fol. 71] tion Appeal Later May Be Dismissed Stop Advise
Department Promptly of Developments

Chambers 111P.

(Duplicate of telephone telegram.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed March 18, 1937

To William S. Ervin, Attorney General, State of Minnesota,
and Ordner T. Bundlie, Assistant Attorney General, At-
torneys for Petitioner, 1246 University Avenue, St. Paul,
Minnesota:

You will please take notice that the United States of
America, one of the respondents in the above entitled action,
considering itself aggrieved by the order of the Court made
and entered on the 23d day of December, 1936, does hereby
appeal to the United States Circuit Court of Appeals for
the Eighth Circuit from said judgment.

This appeal is taken upon questions of fact and of law and
is based upon the files, records, assignments of error and
other papers filed herein.

Dated this 18th day of March, A. D. 1937.

George F. Sullivan, United States Attorney for the
District of Minnesota, and Attorney for Respond-
ent United States of America.

Service of the foregoing Notice of Appeal is hereby ad-
mitted this 18 day of March, A. D. 1937.

Ordner T. Bundlie, Assistant Attorney General, At-
torney for Petitioner.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 18, 1937

Comes now the United States of America, one of the respondents in the above entitled action, by George F. Sullivan, its United States Attorney for the District of Minnesota, and in the above entitled cause files the following Assignments of Error upon this its appeal from the order entered by this Honorable Court on the 23d day of December, 1936.

I

The court erred in making and entering in the above entitled action its order dated December 23, 1936.

II

The court erred in denying the motion of the United States of America to dismiss the above entitled action for want of jurisdiction.

III

The court erred in denying the motion of the United States to dismiss the above entitled action with particular reference to the tract designated as parcel No. 5 and more particularly described in the petition of the State of Minnesota.

IV

The court erred in finding and adjudging that the consent of the United States to bring these proceedings against Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to Title 25, U. S. C., Section 357, and that the United States accordingly is not a necessary party.

V

The court erred in finding and adjudging that the taking of the lands described in the petition by the State of Minnesota is authorized by law.

VI

The court erred in finding and adjudging that on March 12, 1936, Paul Quodonce executed a certain deed purport-

ing to convey to the United States in trust for the Grand Portage band of Chippewa Indians, all of his right, title and interest in and to parcel No. 5, as described, in the petition of the State of Minnesota; that the said conveyance was made subsequent to the filing of Notice of Lis Pendens in the above entitled matter by the State of Minnesota and with notice of the pendency of this action, and that the said [fol. 73] conveyance is void insofar as it affects the right of the State of Minnesota to proceed in this action and the estate vested in the United States of America is subject to the easement acquired by the State of Minnesota by virtue of these proceedings.

VII

The court erred in finding and adjudging that the District Court of the State of Minnesota for the Eleventh Judicial District, Cook County, Minnesota, had jurisdiction of the above entitled action and that the said jurisdiction became vested in the United States District Court by removal thereto.

VIII

The court erred in granting the petition of the State of Minnesota.

Wherefore, the United States of America, one of the respondents in the above entitled action prays that the order entered by the court in the above entitled action on December 23, 1936, be in all respects reversed, set aside and vacated, and that the above entitled cause be remanded for such proceedings in the trial court as may be consistent with justice.

Dated at St. Paul, Minnesota, this 18th day of March, A. D. 1937.

George F. Sullivan, United States Attorney for the District of Minnesota, and Attorney for Respondent United States of America.

Service of the foregoing Assignments of Error is hereby admitted this 18th day of March, A. D. 1937.

Ordnor T. Bundlie, Assistant Attorney General, Attorney for Petitioner.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION THAT ASSIGNMENT OF ERRORS MAY BE AMENDED
AT ANY TIME DURING TERM OF COURT AND APPROVAL
THEREOF BY DISTRICT JUDGE—Filed March 18, 1937

It is hereby stipulated by and between George F. Sullivan, United States Attorney for the District of Minnesota, and [fol. 74] attorney for respondent United States of America, and Ordner T. Bundlie, Assistant Attorney General, attorney for petitioner, that at any time during the term of court in which the appeal of the United States of America in the above entitled action is allowed, and at any time prior to the filing of briefs in the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing Assignments of Error may be amended by adding to, altering or eliminating any or all of the said assignments or any part thereof.

George F. Sullivan, United States Attorney for the District of Minnesota, and Attorney for Respondent United States of America. Ordner T. Bundlie, Assistant Attorney General, Attorney for Petitioner.

ORDER

Upon the foregoing, it is hereby

Order That at any time during the term of court in which the appeal of the United States of America in the above entitled action is allowed, and at any time prior to the filing of briefs in the United States Circuit Court of Appeals for the Eighth Circuit, the foregoing Assignments of Error may be amended by adding to, altering or eliminating any or all of the said assignments or any part thereof.

Dated this 18th day of March, A. D. 1937.

Robert C. Bell, Judge, U. S. District Court, District of Minnesota.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL, ETC.—Filed March 18, 1937

The United States of America, one of the respondents in the above entitled cause, having duly presented its petition for appeal and having duly served and filed its notice of appeal and assignments of error, and no bond on appeal being required of the United States of America under Section 1001 of the Revised Statutes of the United States (28 [fol. 75] U.S.C. 870), the court being satisfied that this appeal is taken by direction of the Attorney General of the United States as appears from the communication attached to and made a part of the petition for appeal herein, the prayer of the United States of America is hereby granted and accordingly

It Is Ordered That the appeal of the United States of America, one of the respondents in the above entitled action be and the same is hereby allowed.

Dated at Mpls., Minnesota, this 18 day of March, A. D. 1937.

Robert C. Bell, Judge, U. S. District Court, District of Minnesota.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL ASSIGNMENTS OF ERROR—Filed April 17, 1937

Comes now the United States of America, one of the respondents in the above entitled action, by George F. Sullivan, its United States Attorney for the District of Minnesota, and in the above entitled cause, files the following Supplemental Assignments of Error upon this its appeal from the order entered by this Honorable Court on the 23rd day of December, 1936:

IX

The court erred in assuming jurisdiction of this action.

X

The court erred in ordering and declaring that the State of Minnesota shall have an easement for highway purposes in and to lands described in the petition, and that the rights and privileges which appertain to the owners of said lands shall be subject and subordinated to the use of the State of Minnesota as a public highway, and in ordering and declaring in effect that the buildings and structures upon the said lands shall be subject to be moved off the purported right-of-way of said highway in such manner and at such time as may be determined in these proceedings, and that the [fol. 76] State of Minnesota shall have the right to construct and maintain such temporary snow fences upon the tracts and parcels of land described in the petition and upon the lands adjacent thereto as provided by law, and that the State of Minnesota shall have the exclusive control and regulation of the culture and cutting of all grasses, shrubs, trees and natural growth now existing on the lands purported to be acquired by the State herein and the planting of grasses, shrubs and trees thereon.

Wherefore, the United States of America, one of the respondents in the above entitled action, prays that the order entered by the court in the above entitled action on December 23, 1936, be in all respects reversed, set aside and vacated, and that the above entitled cause be remanded for such proceedings in the trial court as may be consistent with justice.

Dated at St. Paul, Minnesota, this 15th day of April, A. D. 1937.

George F. Sullivan, United States Attorney for the District of Minnesota, and Attorney for Respondent United States of America.

Service of the foregoing is hereby admitted this 15 day of April, A. D. 1937.

Ordnier T. Bundlie, Assistant Attorney General, Attorney for Petitioner.

Citation, in usual form, showing service on Ordner T. Bundlie, filed March 19, 1937, omitted in printing.

[fol. 77] IN UNITED STATES DISTRICT COURT

ELECTION ~~to~~ TO PRINTING OF RECORD—Filed April 17, 1937

To the Clerk of the United States District Court for the District of Minnesota:

In pursuance of the praecipe therefor filed in the above-entitled cause you are hereby respectfully requested to prepare the transcript in typewritten form on the appeal by the United States of America, one of the Respondents in the above-entitled cause, from the order of the court entered on the 23d day of December, 1936, in said cause, in order that said transcript may be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri.

And the said Respondent United States of America hereby elects to have the record in said cause on appeal [fol. 78] as aforesaid printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Dated April 16, 1937.

George F. Sullivan, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPÉ FOR TRANSCRIPT—Filed April 17, 1937

It is hereby stipulated and agreed by and between the undersigned respective counsel for the Petitioner above named and the Respondent United States of America that the Clerk of the United States District Court for the District of Minnesota be and is hereby directed to prepare and certify a transcript of the record in the above-entitled cause for the use of, and to make a return to, the Circuit Court of Appeals for the Eighth Circuit by including therein the following:

1. Petition.
2. Notice with returns of service thereon.
3. Petition for Removal.
4. Stipulation.

5. Order of Removal.
6. Certificate of Clerk of District Court, Cook County, Minnesota, attached to transcript.
7. Affidavit of non-residence.
8. Affidavit of Publication.
9. Bill of Exceptions or settled case together with Stipulation and Order allowing same.
10. Notice of Appeal.
11. Assignments of Error.
12. Stipulation and Order providing for amendments to Assignments of Error.
13. Petition for Appeal.
14. Order allowing Appeal.
15. Citation on Appeal.
16. Supplemental Assignments of Error.
- [fol. 79] 17. Any orders hereafter made enlarging citation.
18. Election as to printing of record.
19. This praecipe for transcript together with the admissions of service and dates endorsed on above-mentioned papers by attorney for above-named Petitioner.

George F. Sullivan, United States Attorney. Ordner T. Bundlie, Assistant Attorney General, Attorney for Petitioner, State of Minnesota.

Dated at St. Paul, Minnesota, this 16th day of April, 1937.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] Appearances of counsel omitted in printing.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS

**Statement of Facts and Motion of Appellee to Dismiss
Appeal—Filed April 28, 1937**

To The United States of America, George F. Sullivan, United States Attorney, Lewis N. Evans, Assistant United States Attorney, and E. E. Koch, Clerk of the above named Court:

STATEMENT OF FACTS.

The State of Minnesota, by its Attorney General, instituted condemnation proceedings in the District Court, Eleventh Judicial District, Cook County, Minnesota, for the purpose of acquisition of certain lands for highway purposes in Cook County. The lands sought to be acquired in the State's condemnation proceedings, which is entitled, "State of Minnesota by Harry H. Peterson, its Attorney General, vs. Paul Quodonce, et al.", traverse lands allotted in severalty to the Indians in said county, which lands consisting of nine (9) parcels, form a part of the Chippewa [fol. 82] Indian Reservation. The Commissioner of Highways for the State of Minnesota duly designated the permanent location of Trunk Highway No. 61, also known as United States Highway No. 61, and the lands sought to be acquired would form the right of way for a portion of said trunk highway, by order pursuant to Section 2554, Subdivision 4a, Mason's Minnesota Statutes for 1927. Prior to the hearing on the petition, the United States of America, above appellant, through George F. Sullivan, its District Attorney, stipulated with the State of Minnesota for the removal of said proceedings to the United States District Court, District of Minnesota, Fifth Division, and the files and proceedings were thereupon transferred to said Court at Duluth, Minnesota. The stipulation (typewritten transcript of Record, page 24) provided that the United States of America appeared generally for the Indian allottees and that when said proceedings was so transferred that the State might have the relief sought for by its petition.

That the hearing on the petition in condemnation came on for hearing before the Honorable Robert C. Bell, one of the judges of said court on September 16, 1936, at Duluth, Minnesota. At the time of said hearing the State presented said

petition with the necessary exhibits as referred to in the typewritten transcript of the record, and made a *prima facie* case for the court and moved for the granting of the petition. The above appellant appeared generally for the Indians and also specially for the purpose of making a motion for a dismissal of said proceedings, based upon the grounds:

1. That this is an action against the United States and that consent had not been given thereto.
- [fol. 83] 2. That the State court where the procedure was first brought had no jurisdiction over the United States.
3. That the United States had not been duly served with process in the manner prescribed by law.
4. That the action be dismissed with particular reference to the tract described in the petition of the State as Parcel 5, allotted to Paul Quodonce, based on a purported conveyance by said Quodonce to the Chippewa Tribe.

Said Federal Court after hearing arguments of counsel and the submission of filing of briefs by respective counsel did, under date of December 23, 1936, make and file its order overruling all of the objections of the appellant, United States of America, and granting in all things the State's petition (typewritten transcript, page 55), and appointing commissioners and alternates for the appraisal of said lands and the filing of their written report to the Court as provided by law.

The above appellant on March 18, 1937, served upon appellee notice of appeal to the above named court from the order of court granting in all things the State's petition in condemnation.

NOTICE OF MOTION OF DISMISSAL OF APPELLANT'S APPEAL

You, and each of you, will please take notice that the appellee will, upon all the files, records, assignments of error and the typewritten record of the proceedings herein, on Friday, the 7th day of May, 1937, at ten o'clock A. M. of said day or as soon thereafter as counsel can be heard, move the above named court for an order dismissing appellant's appeal from the order of the Honorable Robert C. Bell, Judge [fol. 84] of the United States District Court, District of Minnesota, Fifth Division, made and filed with the Clerk thereof

at Duluth, Minnesota, on the 23rd day of December, 1936, granting the petition of the appellee for the condemnation of certain lands in Cook County, Minnesota for state trunk highway purposes. That said motion will be heard before the above named court at the regular session thereof in the court rooms in the Federal Building, City of Saint Paul, County of Ramsey, State of Minnesota, at the time above set forth.

GROUNDS FOR MOTION OF DISMISSAL

The grounds and reasons for appellee's motion for dismissal of appellant's appeal are:

1. That the order granting the appellee's condemnation is not an appealable order.
2. That the appeal is premature and untimely made.
3. That the appeal is contrary to law.
4. That the above named Court has no jurisdiction over the parties hereto or the subject matter.

Dated at Saint Paul, Minnesota, April 28, 1937

William S. Ervin, Attorney General; Ordner T. Bundlie, Assistant Attorney General, 1246 University Avenue, Saint Paul, Minnesota, Attorneys for the Appellee.

[fol. 85] Due service of the within Motion, etc., is hereby admitted at St. Paul, Minn. this 28th day of April 1937.

George F. Sullivan, U. S. Attorney, by Lewis N. Evans, Assistant U. S. District Attorney.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION OF APPELLEE TO DISMISS, WITHOUT PREJUDICE, ETC.—May 17, 1937

The Court having considered the motion of appellee to dismiss the appeal from the District Court in this cause, the briefs and oral argument of counsel in support of and in opposition thereto, It is now here ordered by this Court that the said motion, be, and it is hereby, denied, without preju-

dice to the right of the appellee to renew the same in connection with the presentation of the merits of the case if it shall be so advised.

[fol. 86] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—November 20, 1937

This cause having been called for hearing in its regular order, argument was commenced by Mr. Victor E. Anderson, United States Attorney, and continued by Mr. Thomas E. Harris, Special Attorney Department of Justice, for appellant, continued by Mr. Ordner T. Bundlie for appellee and concluded by Mr. Thomas E. Harris, Special Attorney Department of Justice, for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1937

No. 10,905

UNITED STATES OF AMERICA, Appellant,

vs.

STATE OF MINNESOTA, by its Attorney General, Appellee

Appeal from the District Court of the United States for the
District of Minnesota

Mr. Victor E. Anderson, United States Attorney, and Mr. Thomas E. Harris, Special Attorney, Department of Justice (Mr. Lewis N. Evans, Assistant United States Attorney, was with them on the brief) for appellant.

Mr. Ordner T. Bundlie, Assistant Attorney General (Mr. William S. Ervin, Attorney General, State of Minnesota, was with him on the brief) for appellee.

Before Stone, Sanborn and Woodrough, Circuit Judges.

OPINION—March 12, 1938.

WOODROUGH, Circuit Judge, delivered the opinion of the court:

This appeal is taken by the United States to reverse certain orders made by the District Court in highway condemnation proceedings instituted in the name of and on behalf of the State of Minnesota.

[fol. 88] It appears that by Article XVI of the Constitution of Minnesota, Trunk Highway No. 61 or Constitutional Highway No. 1 was designated as beginning at a point on the boundary line between the States of Iowa and Minnesota and extending northerly through the City of St. Paul, thence northerly through the City of Duluth and thence northeasterly to a point on the boundary line between the State of Minnesota and the Province of Ontario in the Dominion of Canada. In the early part of 1934 the Highway Commissioner determined upon a relocation of that part of the highway between the northern boundary line of the state and the Reservation River in Cook County, Minnesota, and on February 15, 1934, he filed the centre line and width orders designating the relocation of the highway so as to pass over and across the Grand Portage Indian Reservation. Thereupon a petition in due form was filed in the name of the State in the proper district court of the state in the matter of the condemnation of the lands needed for the relocation of the highway, and it appeared on the face of the petition that the several tracts of land sought to be condemned and taken for the highway were lands within the Indian Reservation allotted under Indian allotments and that the United States was the holder of the fee of the several tracts in trust for the Indians. Removal was taken to the federal court and the cause having come on to be heard, the State presented the petition in condemnation and the relocation orders and maps and moved for the allowance of its petition and for the appointment of appraisers to appraise and report their awards. There was no showing that authority for the construction of the highway across the Indian lands and reservation had been obtained from the Secretary of the Interior of the United States.

The United States appeared specially by the United States District Attorney for Minnesota and moved that the action be dismissed on the ground among others that the court was without jurisdiction for the reason that the United States had not consented to the maintenance of the condemnation suit against it. The trial court reached the conclusion:

"That the consent of the United States to bring these proceedings against Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 United States Code Annotated, Section 357, and that the United States accordingly is not [fol. 89] a necessary party respondent to these proceedings."

The motion of the United States to dismiss was therefore denied and exception saved.

The government appealed and motion to dismiss the appeal was denied by this court. The appeal presents the question whether the State of Minnesota has the power without the consent of the Secretary of the Interior to condemn and take the allotted Indian lands held by the United States in trust for the Indians and to open up a highway right of way across the Indian Reservation.

The provisions of the Constitution pertinent to the powers of the federal government in relation to Indian tribes, Indians, Indian reservations and Indian lands are:

Article 2, Sec. 2, Clause 2. * * * [The President] shall have power by and with the advice and consent of the Senate to make treaties provided two thirds of the Senators present concur.

Article 1, Sec. 8, Clause 1-3. The Congress shall have power to * * * regulate commerce with * * * the Indian tribes.

Article IV, Sec. 3, Clause 2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Pursuant to the constitutional provisions the Indian lands have been drawn completely within the sovereignty of the United States and the highest dominion over them is vested

in the federal government.¹ That government has undertaken the guardianship of the Indians and has reserved to itself the right to determine the manner in which the guardianship has been and shall be carried out. It has retained in itself title to the lands it permits the Indians to occupy, the authority to make laws and regulations respecting the territory and the broad power to legislate and act for the protection of the Indians collectively and individually wherever they may be within the territory of the United States. It is apparent that to enter upon and appropriate [fol. 90] the individual Indian lands by the establishment of a highway easement over them and through the Indian reservation would directly and substantially affect the title of the United States in and to the lands and its dominion over them. It would restrict the government in its regulations concerning the lands, embarrass it in using the land and substantially interfere with its right of disposal.² We think it is clear under the decisions that the State of Minnesota would not have power to maintain its suit for condemnation against the United States in the absence of consent given by that government. U. S. v. McGowan, — U. S. — (January 3, 1938); Cherokee Nation v. Ry., 135 U. S. 656; Surplus Trading Co. v. Cook, 281 U. S. 647; Utah Power & Light Co. v. U. S., 243 U. S. 389.

In Cherokee Nation v. Ry., 135 U. S. l. c. 656, the Supreme Court considered the question of whether the effect of state power of eminent domain was to preclude federal powers of eminent domain deemed inconsistent; the court concluded federal power was not lost, quoting from Mr. Justice Bradley in Stockton v. R. R., 32 Fed. 19,

"The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate

¹ U. S. v. McGowan, — U. S. — (Jan. 3, 1938); U. S. v. Minnesota, 270 U. S. 181; Brewer-Elliott v. U. S., 260 U. S. 77; Minnesota v. Hitchcock, 185 U. S. 373; Cherokee Nation v. Ry., 135 U. S. 641.

² Clairmont v. U. S., 225 U. S. l. c. 556; Hallowell v. U. S., 221 U. S. 317, 323-4; U. S. v. Sutton, 215 U. S. 291; Utah & N. Ry. v. Fisher, 116 U. S. 28; Cf. U. S. v. Unzeuta, 281 U. S. 138.

the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things.

• • • Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the government of the United States is vested with full and complete power to execute and carry out its purposes."

The law that governs Indian Reservations and lands is discussed in *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650, and in *U. S. v. McGowan*, — U. S. — (January 3, 1938). In the former case the court said,

"It is not unusual for the United States to own within a State lands which are set apart and used for public pur-[fol. 91] poses. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the protection of her laws, save that the latter CAN-NOT AFFECT THE TITLE OF THE UNITED STATES OR EMBARRASS IT IN USING THE LANDS OR INTERFERE WITH ITS RIGHT OF DISPOSAL."

"A typical illustration is found in the usual Indian Reservation set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life . . ." (Emphasis supplied.)

In *U. S. v. McGowan*, the court said,

"Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, (citing in footnote, *U. S. v. Sandoval*, 231 U. S. 28) . . .

"The government retains title to the lands which it permits the Indians to occupy. The government has authority to enact regulations and protective laws respecting this territory. (Citing in footnote, *Hallowell v. U. S.*, 221 U. S. 317; Constitution, Art. IV, Sec. 3, Cl. 2). . . . Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States . . . *United States v. Ramsey*, 271 U. S. 471."

In Utah Power & Light Co. v. U. S., 243 U. S. 389, certain States filed brief as amici curiae to urge upon the Supreme Court the proposition that

"The existence of easements of a public nature over vacant federal lands does not interfere with the disposal of such lands by the federal government, but is in aid thereof; and the claim made by the States of the right to control the creation and continuance of such easements, within their respective territorial jurisdictions, does not conflict with the power of Congress 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States' ", and further that the matter was for state police power, not for Congress (l. c. p. 400, 401) But the Supreme Court held that the defendant power companies must comply with the regulations of the Secretary of the Interior or move off the land which had [fol. 92] been placed (after company occupancy in some instances) in a federal forest reservation; it held further that state authority of eminent domain could not justify the presence of the companies on government owned land, (saying, p. 404, 405)

"Not only does the Constitution (Art. IV, Sec. 3, Cl. 2) commit to Congress the power 'to dispose of and make all needful regulations and rules respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish * * * etc. * * *, it may not tax the lands themselves or invest others with any right whatever in them. (Citing cases.) From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited, etc. * * * AND HAS PROVIDED FOR AND CONTROLLED THE ACQUISITION OF RIGHTS OF WAY OVER THEM

FOR HIGHWAYS, railroads, . . . and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. (Citing cases.)

"It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress." (Emphasis supplied.)

We turn to the contention that Congress gave its consent to these proceedings in condemnation of the Indian lands for highway purposes by the Act of Congress of March 3, 1901, 31 Stat. 1084 and the concluding provision of Section 3 of the Act.

[fol. 93] The Act of March 3, 1901, was the Indian Appropriation Act making appropriation for the fiscal year 1902, and provisions were incorporated in it concerning the construction of telephone and telegraph lines over and through Indian reservations under regulations to be prescribed by the Secretary of the Interior and also provisions applicable to condemnation or other procedure by State or local authorities for the opening and establishment of public highways through any Indian reservation, over allotted Indian lands. The provision which we deem applicable and controlling as to such highway condemnation proceedings and the consent of the United States therefore reads:

"Section 4 (25 U. S. C. 311) Opening Highways:

"The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under the laws or treaties but which have not been conveyed to the allottee with full power of alienation."

The plain intendment of this section is that the consent of the United States to the maintenance of condemnation pro-

ceedings to open up highways through the Indian reservation and the allotted lands is not given but is withheld except upon permission granted by the Secretary of the Interior. Such was the conclusion of the Circuit Court of Appeals of the 4th Circuit upon consideration of this provision of the act.

In U. S. v. Colvard, 89 Fed. (2d) 312, that court held that it was not only the right, but the duty of the United States to enjoin individuals from building a highway across lands held by the United States in trust for two Indians. The individuals had secured a condemnation of the lands under state authority, but the court held that the United States was not bound by the condemnation proceedings because it was not a party thereto, and because the state courts (which had held themselves devoid of jurisdiction against the United States in contract cases) had "no jurisdiction of proceedings affecting land held by the United States in trust for the Indians." The court said,

[fol. 94] "If a roadway over the Indian lands was desired, application should have been made to the Secretary of the Interior pursuant to provisions of the Act of March 3, 1901, Sec. 4, 31 Stat. 1058, 1084 (25 U. S. C. A. 311).

"A right of way could no more be acquired over these lands by proceedings against the Indians than title to lands embraced in a government forest could be tried by suit against the forester, nor than post office property could be condemned for purposes of a street by proceedings against the postmaster."

When the concluding provision of Section 3 of the Act of March 3, 1901, relied on by the state is read in connection with its context, the rest of Section 3, it becomes apparent that the provision does not and was not intended to conflict with or to withdraw the conditions laid down in Section 4 of the Act, *supra*, upon which the United States consented to proceedings to open up highways through allotted Indian lands. Section 3 reads:

"The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices * * * through an Indian Reservation, * * * or through lands which have been allotted in severalty to any individual Indian under

any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefore has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval.

"The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval.

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded in damages shall be paid to the allottee."

[fol. 95] The context shows that the concluding provision relates merely to permissive procedure in authorized suits for condemnation of allotted Indian lands. The power to make such condemnation for the opening of highways remains conditional as provided in Section 4, supra.

The United States not having consented to the maintenance of the condemnation suit of the State against it, the Court is without jurisdiction to proceed. *Morrison v. Work*, 266 U. S. 481, 485, 486; *U. S. v. Colvard* (C. C. A. 4) 89 Fed. (2d) 312; *Turner v. U. S.*, 248 U. S. 354, 359; *U. S. v. Babcock*, 250 U. S. 328, 331; see *Wood v. Phillips* (C. C. A. 4) 50 Fed. (2d) 714; *Compagnie Etc. v. Canal Zone* (C. C. A. 5) 90 Fed. (2d) 225; *U. S. v. Turner* (C. C. A. 8) 47 Fed. (2d) 86; *Boeing Air T. v. Farley* (App. D. C.) 75 Fed. (2d) 765; *T. W. A. v. Farley* (C. C. A. 2) 71 Fed. (2d) 288. Cf. *Minnesota v. Hitchcock*, 185 U. S. l. c. 385 seq.

The fact that removal from the state court to the federal court was obtained by the United States Attorney through stipulation did not effect a general appearance. *Employers' Corp. v. Bryant*, 299 U. S. 374, 377; *Lambert Run Coal Co. v. B. & O. R. R.*, 258 U. S. 377. The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Munro v. U. S. — U. S. —* (January 31, 1938); *Stanley v. Schwalby*, 162 U. S. 255, 270; *Finn v. U. S.*, 123 U. S. 227.

Reversed with directions to dismiss.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 10905

UNITED STATES OF AMERICA, Appellant

vs.

STATE OF MINNESOTA, by Its Attorney General

JUDGMENT—March 12, 1938

Appeal from the District Court of the United States for
the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered by this Court that this cause, be, and the same is hereby remanded to the said District Court with directions to dismiss.

[fol. 97] Clerk's certificate to foregoing transcript omitted
in printing.

[fol. 98] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,558. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 73. State of Minnesota, by its Attorney General, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 31, 1938. Term No. 73, O. T. 1938.

(8100)

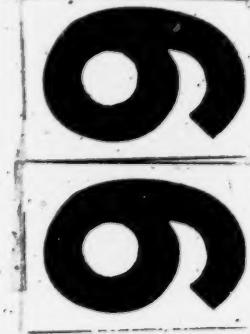
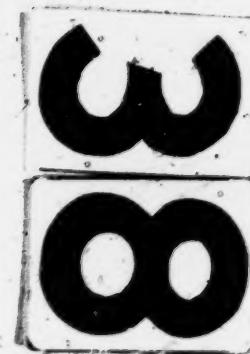
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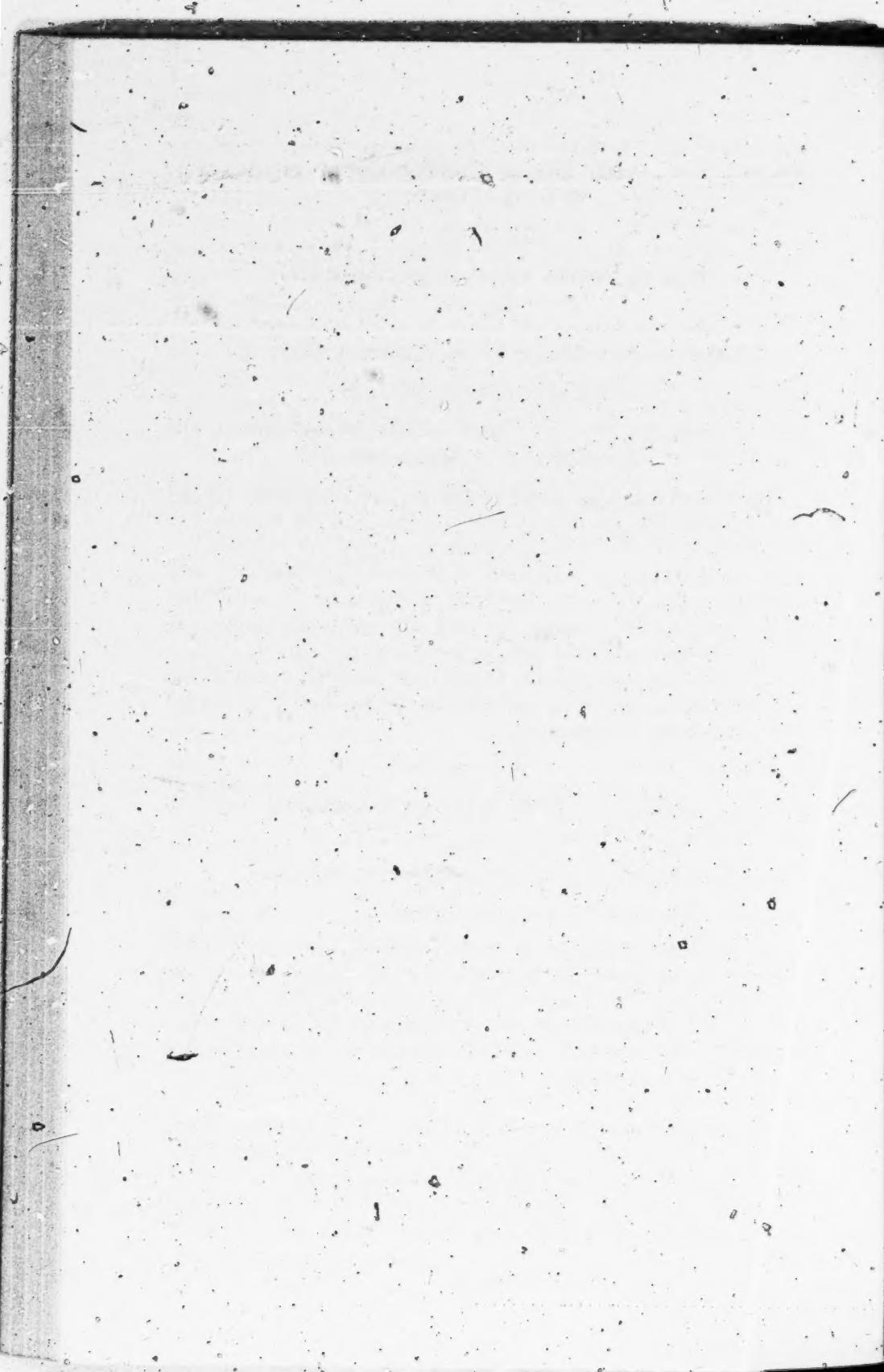
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CHARLES F. MORSE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 73.....

STATE OF MINNESOTA, by its Attorney
General,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Circuit Court
of Appeals—
Eighth Circuit
No. 10,905

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF.**

WILLIAM S. ERVIN,

Attorney General State of Minnesota,

ORDNER T. BUNDLIE,

Assistant Attorney General State of Minnesota,

Attorneys for Petitioner.



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IN THE
Supreme Court of the United States

OCTOBER TERM 1937

No.

STATE OF MINNESOTA, by its Attorney
General,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Circuit Court
of Appeals—
Eighth Circuit
No. 10,905

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, State of Minnesota by its Attorney General, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review the judgment of that court in this cause, filed March 12, 1938, reversing the order of the United States District Court for the District of Minnesota, Fifth Division, and directing a dismissal of the State's action in condemnation (R. 92). A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals for the Eighth Circuit is furnished herewith in compliance with Rule 38 of the rules of this court.

I.

JUDGMENT BELOW.

This writ is sought to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, rendered and filed on March 12, 1938, (R. 92) which, in effect, prohibits the State of Minnesota from condemning for state trunk highway purposes lands allotted in severalty to individual Indians.

II.

QUESTIONS PRESENTED.

1. Whether or not Section 3 of the Act of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A. Sec. 357) authorizes the State of Minnesota to condemn under its State laws for State trunk highway purposes lands allotted in severalty to individual Indians in the same manner as though the Indians were the fee owners thereof, and grants consent thereto without making the United States a necessary party to said proceedings.
2. Whether or not the Treaty of September 30, 1854 (10 Stat. 1109) with the Grand Portage Band of Chippewa Indians of Lake Superior, and the subsequent Act of Congress approving same January 14, 1889 (25 Stat. 642) expressly grants to the State the authority to construct highways over and across lands allotted in severalty to individual Indians, upon paying just compensation therefor as provided by the last sentence of Article III thereof, as follows: "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

3. Whether or not the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional State trunk highway required to be so located and constructed by its Constitution and laws, may exercise its inherent power of eminent domain for such purposes over and across lands allotted in severalty to individual Indians, either with or without express Congressional authority therefor.

III.

STATUTES, TREATY AND STATE CONSTITUTION INVOLVED.

There are four statutes primarily involved in this case, as follows:

(a) Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084 (25 U. S. C. A. 357) as follows:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

(b) Act of March 3, 1901, Chapter 832, Section 4, 31 Stat. 1084, (25 U. S. C. A. 311), which provides:

"The Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not

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been conveyed to the allottee with full power of alienation."

(c) Act of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 319) providing at the beginning of said Act:

"The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines * * * through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, * * *. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval, * * *."

(d) Treaty between Federal Government and the Grand Portage Band of Chippewa Indians of Lake Superior, dated September 30, 1854, (10 Stat. 1109) and the Act of Congress approving January 14, 1889, (25 Stat. 642); the salient portion of the Treaty found in the last sentence of Article III thereof, as follows:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

(e) Constitution of the State of Minnesota, Article 16, Section 1 thereof, as follows:

"There is hereby created and established a trunk highway system, which shall be located, constructed, reconstructed, improved and forever maintained as public highways, by the State of Minnesota. The said high-

ways shall extend as nearly as may be along the following described routes, the more specific and definite location of which shall be fixed and determined by such boards, officers or tribunals, and in such manner, as shall be prescribed by law, but in fixing such specific and definite routes there shall not be any deviation from the starting points or terminals set forth in this bill, nor shall there be any deviation in fixing such routes, from the various villages and cities named herein, through which such routes are to pass."

Route 1 thereof, described in the Constitution, is the location of the trunk highway concerned herein.

(*) Section 2554, Subdivision 1 Mason's Minnesota Statutes 1927, a portion thereof, concerning the powers of the commissioner of highways, as follows:

"The commissioner of highways is empowered to carry out the provisions of Section 1 of Article 16, of the Constitution of the state, and is hereby authorized to acquire by purchase, gift, or condemnation as provided by statute all necessary right of way needed in laying out and constructing the trunk highway system, and to locate, construct, reconstruct, improve and maintain such trunk highway system, * * *; and in carrying out the provisions of said Section 1, of Article 16 of the Constitution of the State, is hereby authorized to expend out of the trunk highway fund such portions thereof as may be available for the purposes herein provided,
* * *"

IV.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding originated in an action by the State of Minnesota through its Attorney General and at the request of its Commissioner of Highways to condemn an easement for trunk highway purposes in Cook County, Minnesota, on lands allotted in severalty to individual Indians. The proceeding was commenced in the State District Court, Eleventh Judicial District, Cook County, Minnesota, on February 6, 1936 (R. 1-11). The condemnation was instituted in the furtherance of the permanent location and subsequent construction of constitutional route No. 1, now known as state trunk highway No. 61 and United States highway No. 61, as authorized by Article 16 of the State Constitution and the Public Highways Act, Chapter 323, Session Laws of Minnesota of 1921. The easement sought was for right of way for trunk highway purposes, concerning nine non-contiguous, separate parcels of land which had been allotted in severalty to individual Indians by the issuance of trust patents. The lands allotted in severalty to such individual Indians form a part of the Grand Portage Indian Reservation granted for the use and benefit of the Grand Portage Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and an Act of Congress approving January 14, 1889 (25 Stat. 642).

In February, 1934, long prior to the institution of the condemnation proceeding the Commissioner of Highways of the State, pursuant to law, made and filed his permanent location of said trunk highway over and across lands in Cook County, including the allotted Indian lands affected herein,

as evidenced by the State's center line order and width order introduced in evidence in such proceedings (R. 41, 44), which orders, in accordance with State law, provide the only methods and means of designating the permanent location of a state trunk highway. Thereafter the State, by purchase and condemnation, acquired all the necessary right of way for said highway in Cook County within said designation with the exception of the nine parcels of land affected in the instant case. In this proceeding the Indian allottees were made parties respondent in the State court, as well as the Superintendent of the Consolidated Chippewa Agency and the United States of America (R. 1).

Subsequent to the commencement of the proceeding a stipulation dated April 7, 1936, was entered into between the State and the United States Attorney for the District of Minnesota (R. 24), providing for the removal of the case from the District Court, Cook County, Minnesota, Eleventh Judicial District, to the United States District Court for the District of Minnesota, Fifth Division, and under order dated April 8, 1936, pursuant to said stipulation, the State court ordered the removal of the case for hearing and further proceeding to the Federal District Court (R. 26). Such stipulation also provided, in part, "at which time the petition of the State of Minnesota may be heard and such proceedings had thereon as prayed in the said petition." (R. 25).

The condemnation petition came on for hearing before the Federal District Court, District of Minnesota, Fifth Division, on September 16, 1936, at which time the State presented its petition and the Court received in evidence such center line and width orders, as well as a map showing the specific parcels of allotted Indian lands sought to be acquired for trunk highway purposes (R. 41-48). The United

States appeared specially, objecting to the granting of the petition and sought a dismissal of the proceedings on the ground, among others, that the court was without jurisdiction for the reason that the United States had not consented to the maintenance of the condemnation suit against it (R. 48),

On December 23, 1936, the said Federal Court made and entered its order denying the motion of the United States and granting in all things the petition of the State of Minnesota, (R. 58) expressly adjudging "that consent of the United States to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 U. S. Code Annotated, Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings." (R. 59).

The United States on March 18, 1937, appealed from such order granting the State's condemnation to the Circuit Court of Appeals, Eighth Circuit (R. 71), and pending such appeal the State made a motion for dismissal thereof on the grounds that the order was not appealable and the appeal was prematurely and untimely made (R. 81), which motion was denied by the Circuit Court without prejudice to the State to renew the motion in connection with the presentation of the merits of the case (R. 83). On March 12, 1938, the Circuit Court rendered its decision and judgment reversing the lower Federal Court and directing a dismissal of the condemnation proceeding (R. 92). The mandate was issued to the lower Federal Court, March 31, 1938 (R. 93). *

A writ is sought for the purpose of reviewing the decision of the Circuit Court of Appeals, Eighth Circuit, and judgment entered pursuant thereto upon the grounds and reasons hereinafter set forth.

V.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this court to grant a writ of certiorari is urged and invoked upon the following grounds:

1. The Circuit Court of Appeals for the Eighth Circuit has interpreted Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) in a way untenable and in conflict with the weight of authority and long established practice, causing great doubt and confusion and, therefore, necessitating the final determination by this Court.
2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.
3. The Circuit Court held, in effect, that the State had no right to condemn, for trunk highway purposes, lands allotted in severalty to individual Indians pursuant to 25 U. S. C. A. 357, supra, without obtaining the consent of the United States and the permission of the Secretary of the Interior to so condemn (R. 90, 91), thereby directly connecting said Section 357 with Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311). The latter section authorizes the Secretary of Interior to grant permission to proper State and local authorities upon compliance with certain requirements for the establishment of public highways through *Indian Reservations* as well as allotted Indian lands. It must be noted that Section 357 concerns only one type of land, namely allotted Indian lands, and as to such lands the authority to condemn for any public purpose is expressly granted, whereas Section 311 covers both tribal lands and allotted Indian lands and the opening of public highways is contingent upon consent of the Secretary of Interior,

obviously presenting a separate and distinct method of acquiring right of way without condemnation proceedings. The Circuit Court fails to distinguish between these two sections as they affect Indian Reservations or lands owned by United States in trust for the tribe and the type of lands herein concerned, namely allotted Indian lands. This is clearly manifested by a reliance upon the case of United States vs. Colvard, 89 Fed. (2d) 312, (R. 90), which is not determinative or decisive of the question presented herein. The Colvard case did not concern allotted Indian lands, but did affect strictly tribal lands, lands owned in fee by the United States in trust for the tribe and not in trust for individual Indians. There is no Federal statute granting the right of condemnation of Indian tribal lands for highway purposes. The only authority for condemnation for public purposes is Section 357 supra, which deals with and only concerns lands allotted in severalty to individual Indians. The case of United States vs. Colvard, supra, is, therefore, totally unrelated to the instant case and does not support the decision of the Circuit Court. Further discussion showing the differentiation between the two cases will be set forth in the supporting brief.

4. The Circuit Court, as its other main authority in support of its decision, cites the case of Utah Power and Light Company vs. United States, 243 U. S. 389 (R. 88), which case likewise does not concern allotted Indian lands nor does it pass upon said Section 357, supra. That case involved power lines placed by a utility company across a Federal forest reservation without condemnation proceedings for an easement or the acquirement of an easement from the Secretary of Interior. The United States successfully brought an action to effect the removal of such lines. That case will be discussed in the supporting brief.

The instant case is in direct conflict with the only other reported decision interpreting 25 U. S. C. A. 357. The case of Shell Petroleum Corporation vs. Town of Fairfax, 180 Oklahoma 326, 69 Pac. (2d) 649, decided June 16, 1937, directly interprets Section 357 and expressly holds that allotted Indian lands may be condemned for any public purpose, that Section 357 grants such right, and that the United States is not a necessary party to the proceeding by virtue of the consent given in Section 357 to maintain such proceedings. The Shell case is discussed at greater length in the supporting brief.

5. The Circuit Court's decision is in direct conflict with and entirely ignores the official regulations and the interpretation, construction and application given to said Section 357 supra, concerning rights of way over Indian lands consistently adhered to and given by the executive department charged with their administration for over thirty years. The Department of Interior has directly construed and interpreted Section 357 supra as evidenced by the following decisions:

35 Land Decisions 648

45 Land Decisions 563

49 Land Decisions 396

These land decisions directly construe Section 357 as granting the express right to the State to condemn allotted Indian lands under the laws of the state or territory where located for any public purpose. The Department of Interior, in harmony with this interpretation, has issued its official regulations concerning rights of way over Indian lands, printed in 1929 and approved May 22, 1928. These regulations, Paragraphs 68, 69 and 70, under the heading of "Con-

demnation of Allotted Lands" cite Section 357 *supra* and construe same as granting the right to condemn allotted Indian lands for any public purpose in accordance with the laws of the State or territory where the lands are so situated. The land decisions and regulations are discussed in the supporting brief.

6. The Circuit Court has wholly failed to pass on and interpret the provision of Article 3 of the Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642), which provides that, "all necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts shall have the right of way through the same, compensation being made therefor as in other cases."

7. The Circuit Court decision precludes the State from performing one of its major governmental functions required to be so performed by its Constitution and State laws in the location, construction and maintenance of one of the major constitutional trunk highways of the State. It is here urged that the location and construction of a state trunk highway through allotted Indian lands would not be such a use as would prejudice the rights of the individual Indians or the United States or be inconsistent with the use thereof, but would prove a vast benefit to the individual Indians and the lands. It is important, therefore, and necessary that the Court review this case so that the rights of the State may be determined with relation to the proper exercising of its duties imposed by law. It is likewise important that this court construe the fundamental and inherent right of the State to exercise its power of eminent domain for a public purpose over allotted Indian lands held in trust for individual Indians, regardless of whether or not there may be

express Congressional authority to so condemn. It is the contention of the State that this right exists as being one of the inherent powers of the State and that even in the absence of an express Congressional act, that this right has always remained in the State. This was the view and interpretation by the Interior Department prior to the enactment of the Act of March 3, 1901, and particularly Section 357 supra. See 19 Land Decisions 24. This right was later affirmed by the Department after the passage of said Act as evidenced by its official regulations of 1928 supra, and 49 Land Decisions 396.

8. It is important, not only to the State of Minnesota, but also to such other states wherein are situated vast areas of lands allotted in severalty to individual Indians, that the questions here presented be finally determined by this Honorable Court. Vested rights and land acquisitions heretofore acquired for various public purposes of great value and magnitude are placed in jeopardy by reason of the decision of the Circuit Court in this case. The State of Minnesota has successfully conducted many condemnations for public purposes through Indian lands of this nature, pursuant to section 357 supra and the land decisions and regulations of the Department of Interior construing the same. We are informed and believe that this practice has been followed for many years in other states as well. It is urged that these vested rights be not lightly set aside.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this court, and that the judgment of the Circuit Court of Appeals for the

Eighth Circuit be reversed; all based upon the reasons and grounds hereinbefore recited.

WILLIAM S. ERVIN,

Attorney General of Minnesota,

ORDNER T. BUNDLIE,

Assistant Attorney General of Minnesota,

Attorneys for Petitioner,

Saint Paul, Minnesota.

STATE OF MINNESOTA,
COUNTY OF RAMSEY—ss.

Ordner T. Bundlie, being duly sworn upon oath states that he is one of the duly acting and qualified Assistant Attorneys General of the State of Minnesota and one of the attorneys for the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said petitioner; that he has read the same and knows the contents thereof and that the facts therein are true to the best of his knowledge, information and belief.

ORDNER T. BUNDLIE.

Subscribed and sworn to before me

this 12th day of May, 1938.

E. F. KRAUSE,

E. F. Krause

Notary Public, Ramsey County, Minn.

My Commission Expires March 15, 1945.

(Notarial Seal)

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

I.

OPINIONS OF THE COURT BELOW.

The order granting condemnation to the State by the Federal District Court, District of Minnesota, Fifth Division, appears in the Record at page 58 and no opinion has been made. The opinion of the Circuit Court of Appeals for the Eighth Circuit is found in the Record at page 84 and is reported in 95 Fed. (2d) 468.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals, Eighth Circuit, to be reviewed was dated and entered March 12, 1938 (R. 92). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

A statement of the case is set forth in the foregoing petition under the caption "Summary Statement of Matter Involved" to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in reversing with direction to dismiss the order of the District Court of the United States, District of Minnesota, Fifth Division, granting the State's condemnation.
2. The Court erred in construing Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) as being subordinate and subject to the consent of the United States to the State's condemnation proceedings, and that the State's condemnation for the opening of the state trunk highway was conditioned upon such consent as provided in Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311).
3. The Court erred in failing to interpret and construe the Treaty between the Federal government and the Grand Portage Band of Chippewa Indians of Lake Superior of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642) and particularly the express right granted under the terms of the treaty as approved by Congress which, under Article 3, the last sentence thereof, contained a direct covenant that "all necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."
4. The Court erred in precluding the State from exercising its inherent power of eminent domain for a public purpose necessary and requisite in the performance of a duty imposed by its Constitution and laws, requiring the State to locate and construct its trunk highway system, where such governmental function would not be prejudicial to or incon-

sistent with the use of said lands by the individual Indians or the Federal government.

V.

ARGUMENT.

A.

Federal Statute authorizes State's condemnation.

The State relies, as authority for its condemnation proceedings, upon the Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 357), herein-after referred to as Section 357, which by its terms expressly authorizes and consents to the condemnation of allotted Indian lands for any public purpose under the state or territorial laws where the land is located. This Federal statute is so clear, concise and free from ambiguity in its meaning that there can be no plausible argument but that Congress gave its express consent to a proceedings of this kind and granted direct authority for proper public authorities to condemn lands allotted in severalty to Indians for any public purpose, as provided by the Act itself, as follows:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee."

In construing this act, petitioner herein respectfully calls the attention of this court to the policy, procedure and practice consistently followed for over thirty years by the Department of Interior, the department having administration of Indian lands and affairs.

The question of the right of a State or political subdivision to condemn allotted Indian lands for public purposes has been determined and settled by the Department of Interior, both prior and subsequent to the enactment of said Section 357. Prior to such enactment, the Secretary of the Interior applied to the Attorney General for an opinion on two questions, (1) "Does such right of eminent domain exist, either in the United States government, or in the State of Montana, as warrants the taking of any part of the lands awarded to the Crow Indians in sovereignty for the purposes mentioned?" and (2) "In which sovereign does that right exist, the United States government, or the State?"

The opinion and answer to these questions was prepared by Assistant Attorney General Hall on June 25, 1894, and duly approved by the Honorable Hoke Smith, Secretary of the Interior, when such an opinion was adopted as a ruling of the Department. This decision is found in the decisions of the Department of Interior relating to public lands, Volume 19 Land Decisions 24, in which the first question is answered by upholding the right of a State to condemn allotted Indian lands for public purposes. In answer to the second question as to which sovereign has the right to condemn, the decision holds, "In conclusion it follows that the State of Montana has the right to condemn, under proper procedure, for public purposes, lands embraced in Indian allotments in said State." It therefore appears that pursuant to the Department's own decision, even before the express right to condemn as evidenced by Section 357 supra was enacted, it recognized the right of a State to condemn allotted Indian lands for public purposes and by so doing, no doubt numerous condemnations over such lands were successfully conducted by the various States and political subdivisions.

We now come to the enactment of Section 357 which is the last paragraph of Section 3 of the Act of March 3, 1901. Said Act was primarily an appropriation act, and, in accordance with the well established practice of Congress, certain provisions of general law were added or tacked on, so to speak, to the appropriation measure. It is well known that many of the most important acts of Congress pertaining to the Indians and their lands have been enacted as "riders to the appropriation bill." The Congressional Record of the Senate of the 56th Congress, Second Session, Volume 34, Part 2, discloses such to be the case, for such record discloses said proceedings on January 25, 1901 in the Senate concerning said Section 357. The record on pages 1447 and 1448 is as follows:

"The reading of the bill was continued to the end of section 3, on page 67.

Mr. Pettigrew: The Committee on Indian Affairs authorizes me to offer an amendment, and I think it should come in at the end of section 3, after line 11, on page 67. I send it up now, and I call the attention of the Chairman of the Committee to it.

The Presiding Officer: The proposed amendment will be read.

The Secretary: Insert at the end of line 13, on page 67 the following: "That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Mr. Thurston: The Committee authorized the moving of this amendment. I will look it over.

The Presiding Officer: The reading of the bill will be continued.

The Secretary resumed and concluded the reading of the bill.

Mr. Thurston: The amendment proposed by the Senator from South Dakota is in accordance with the recommendation of the Committee, and I ask that the Senate agree to it.

The Presiding Officer: The proposed amendment will be read for the information of the Senate.

The Secretary: After line 11 on page 67 insert:

"That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The amendment was agreed to.?

The history of the enactment of Section 357 conclusively shows that it was offered as an amendment, separate and distinct from the other portions of Section 3, as well as all of Section 4 of the Act, and such amendment grants an additional and exclusive method, by condemnation, of acquiring allotted Indian lands for public purposes. The Circuit Court (R. 90) quotes Section 4 of the Act of March 3, 1901, (25 U. S. C. A. 311), which grants authority to the Secretary of the Interior to grant permission to proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, both through Indian Reservations or through any lands which may have been allotted in severalty to the Indians under the laws or treaties. In its opinion (R. 91) the Court also refers to the first part of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 319) which relates to the power of the Secretary of the Interior to grant rights of way in the nature of an easement for telephone and telegraph lines through both Indian Reservation lands and lands allotted in severalty to Indians. The last

paragraph of said Section 3, being 25 U. S. C. A. 357, upon which the State relies in this proceedings, follows this section pertaining to telephone and telegraph lines and rights of way therefor.

The Circuit Court, it is urged, is in error in interpreting the other two sections of the Act of March 3, 1901, namely 25 U. S. C. A. 311 and 319 as being controlling and decisive as to the powers of the Secretary of the Interior where a condemnation is brought for any public purpose under the terms of Section 357. The Circuit Court has construed the right of condemnation of the State as being subject to the permission or consent of the Secretary of Interior to so condemn. It is urged that the State's right to condemn such lands under Section 357 is a separate and distinct right as differentiated from the right of obtaining by negotiation an easement from the Secretary of Interior. One power is complementary of the other. It provides an alternative method of acquiring necessary easements for public purposes in the event the Secretary of Interior and the State cannot agree upon the terms or consideration to be paid for such easement. Section 357 recognizes the power of the public agency or the State to take such lands for public purposes. At the same time the rights of the Indian allottees who, for the purpose of condemnation under Section 357, are considered as owners in fee, are safeguarded by requiring compensation to be made for that which is taken. Section 311 and 319 authorize the Secretary of the Interior to grant easements and permits. Section 357 upon which the State relies, gives the power to condemn. The existence of these two powers side by side, enables the parties concerned to provide for the public well-being by agreement, and if agreement be impossible, then by and through the power of eminent domain. They

are distinct and separate remedies designed to accomplish the same purpose.

What has been the construction of Section 357 by the Department of Interior since its enactment on March 3, 1901, and what has been the practice and procedure of that Department with relation thereto? The Department has placed its own interpretation upon Section 357 since its enactment and has further made rules and regulations in accordance therewith. The Secretary of Interior, in order that there might be no mistake as to the meaning and effect of Section 357, requested an opinion from the Solicitor, and on January 2, 1923, a decision was rendered by the Honorable Edwin S. Booth, Solicitor, which was approved and adopted by the Secretary of the Interior of the same date. This decision will be found reported in the decisions of the Department of Interior relating to public lands, Volume 49 Land Decisions, page 396. We earnestly urge the court to read this decision in full as it reviews not only the Act of March 3, 1901, pertinent hereto, but also prior land decisions of the Department, and opinions of the Attorney General. The Circuit Court's decision is diametrically opposed to this and other land decisions, as well as the Interior Department's rulings and regulations issued in conformity therewith.

It will be noted in this land decision that the Department holds Section 357 as being an alternative remedy for the acquirement of lands for public purposes and is a separate and distinct remedy by eminent domain proceedings. Attention is particularly called to the following, found on the bottom of page 398 and ending on the top of page 399 as follows:

"The fact remains, however, that allotted Indian lands can still be condemned for public purposes where nec-

essary under the provisions of the Act of March 3, 1901, supra. In other words, the remedy resting there is simply an *alternative one rather than a concurrent or an exclusive procedure.* (Italics ours). Even prior to the Act of March 3, 1901, this department held that a State could condemn allotted Indian lands for public purposes. See 19 L. D. 24. Again, the provisions of that Act came before this Department in 1905 and in an opinion dated May 11, 1905 (unreported) the then Assistant Attorney General for this Department held that under the provisions of that Act and of certain statutes of the State of Utah, lands allotted to the Indians within the Utah Reservation could be condemned in favor of persons or corporations desiring to acquire rights of way for canals, ditches, etc. In concluding that opinion it was said: "These quotations from the law of Congress and the laws of the State answer the inquiry and leave no room for discussion or argument. Indian allotments are subject to be condemned for public purposes under the laws of the State or territory where located, before the issue of final patent, to the same extent as if the allottee held the fee to the land. The use of the land for right of way for irrigating ditches is declared by the law of Utah to be a public use in support of which the right of eminent domain may be exercised."

See 35 L. D. 648 and 45 L. D. 563.

In conformity with the Department of Interior's interpretation of Section 357 and the policy and practice consistently pursued and followed, the Department issued its printed regulations concerning "Rights of Way Over Indian Lands", printed in 1929 and issued and approved by the Department of Interior under date of May 22, 1928. Sections 68, 69 and 70 of the printed regulations, page 11, under the heading of "Condemnation of Allotted Lands", are as follows:

"68. The condemnation of allotted Indian lands for any public purpose in accordance with the laws of the State wherein the lands are situated is authorized by the last paragraph of section 3 of the act of March 3, 1901 (31 Stat. L. 1058-1083-1984).

69. Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the act of March 3, 1901, above cited.

70. The superintendent or other officer in charge is expected to keep in close touch with matters affecting the interests of the Indians within his jurisdiction and to report immediately through the Commissioner of Indian Affairs when any condemnation proceedings are instituted. All information available regarding such proceedings, particularly a description of the lands involved, should be given so that the Department of Justice may be requested to enter an appearance in such proceedings in behalf of the owners and to take such other action for their protection as may be warranted by the law and the facts."

To summarize, therefore, the Department having charge of Indian lands and affairs has, since 1894, and both prior and subsequent to the enactment of Section 357, administered and interpreted the law so as to permit and authorize the condemnation of lands allotted in severalty to individual Indians for any public purpose under the laws of the state or territory where the lands are situated and for such purpose the lands are deemed to be held in fee by Indians and damages paid to such allottees. This covers a period of over 40 years and this court has repeatedly laid down the rule that the construction and application for a long period of time of a law by the department or branch of government administering said law shall not lightly be set aside. This rule is aptly stated in the case of *Swendig v. Washington*.

Water Power Company, 265 U. S. 322, concerning the interpretation by the Interior Department of certain acts of Congress relating to Indian lands as reported in Land Decisions, as follows:

"The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.' Logan vs. Davis, 233 U. S. 613, 627."

Further in the case of United States vs. Jackson, 280 U. S. 183, the court on page 193, said:

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration, (cases cited); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

In construing an Act of Congress which had been interpreted in a certain manner by the War Department and opinions of the Attorney General of the United States for nearly thirty years, Chief Justice Taft in the case of Wisconsin vs. Illinois, 278 U. S. 367, on page 413 stated:

"This construction of section 10 is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. U. S. vs. Minn. 270 U. S. 181, 205; Swendig vs. Washington Water Power

Company, 265 U. S. 322, 331; Kern River Company vs. U. S., 257 U. S. 147, 154; U. S. vs. Burlington & Missouri River R. R., 98 U. S. 334; U. S. vs. Hammers, 221 U. S. 220, 228. Logan vs. Davis, 233 U. S. 613, 627. The practice is shown by the opinion of the acting attorney general, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the act. This was followed by the permits subsequently granted, down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports."

It is urged, however, that Section 357 supra, is neither doubtful nor ambiguous in any sense. It is also pointed out that up to the time of the decision of the Circuit Court in this case, that there was no doubt or misunderstanding as to the construction of the terms of this statute, as evidenced by the administration of said act and the practice followed by the Interior Department. The decision of the Circuit Court in the instant case has, contrary to the Government's own regulations and Land Decisions, and the practice and procedure consistently followed, created a confused and chaotic condition jeopardizing all former condemnation proceedings through lands of this type conducted and consummated by the State of Minnesota, as well as other states.

The above undoubtedly accounts for the great lack of reported cases concerning the right to condemn lands allotted in severalty to individual Indians. Presumably the only party who would raise the question as to the interpretation of the act would be the Federal government itself and particularly the Department of Interior. We find after diligent search of authorities only one reported case directly interpreting this section. This is the case of Shell Petroleum

Corporation vs. Town of Fairfax, decided by the Supreme Court of Oklahoma on June 16, 1937, and found reported in 180 Okla. 326, 89 Pac. Rep. (2d) 649, wherein the court, in connection with this subject, said:

"It is next contended by the defendants in their original brief and their reply brief that even though it be granted that the town had power to condemn non-Indian land, the power did not extend to the right to condemn land allotted to a restricted Osage Indian.

In this connection reference is made to a paragraph of Section 3 of the Act of Congress of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A., Section 357) which provides 'lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.'

In view of a letter purporting to be from the Commissioner of Indian Affairs, and approved by the Secretary of the Interior, dated December 24, 1936, relating to other condemnation proceedings had in the District Court of Osage County involving allotted Osage Indian land, in which the above provision of the Act of Congress is quoted, and in which the Commissioner says, 'this law applies to Indian allotments generally, and authorizes condemnation for public purposes under the laws of the State or territory where located,' the defendants in a supplemental brief filed May 21, 1937, apparently recedes from the position first taken that said provision did not apply to allotted Osage Indian land. They now contend that if this may be done the United States is a necessary party and the proceedings cannot be had in a state court, but must be taken in a Federal court.

With these contentions we cannot agree. The Act of Congress quoted above, granting authority to condemn lands allotted in severalty to Indians, says that such lands may be condemned under the laws of the State or

Territory where located. This means the land may be condemned under the provisions of the law of the State or Territory where located. If the law of such State or Territory authorizes a town to condemn land, it may be condemned only for such purposes as the law of the State or Territory may provide. It may be condemned in the same manner. That means the same court and under the same procedure as would be the case if the land were owned in fee. If the land is owned in fee, the State court has power and jurisdiction to condemn. That act confers like authority as applied to allotted Indian land. Likewise if the land is owned in fee, the owner is the only necessary defendant. The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such land without making the United States a party."

Unquestionably the State has the right to condemn for any public purpose lands owned in fee, by individual persons. Section 357 concerned herein, by the terms thereof and for the express purpose of condemnation for a public purpose, places allotted Indian lands in the very same category as lands owned in fee by individual or private persons. Therefore, if the State has the power of eminent domain to condemn lands owned in fee by private persons, then likewise has the State under Sections 357 an equal right to condemn allotted Indian lands as such section provides specifically that the Indians for such purposes are considered the owners thereof and damages accordingly paid to them.

It is submitted that the Department of Interior, as evidenced by its Land Decisions and regulations and consistent policy pursued, has rightly interpreted the power of the

State to condemn for public purposes allotted Indian lands. It must be borne in mind that this proceeding was instituted by the State of Minnesota for the location and construction of a trunk highway. The two cases relied upon by the Circuit Court, discussed hereafter, involve the use of Federal forest lands by a utility company in one case, while the other case concerned the use of strictly tribal lands by private parties for private purposes. It is urged that the purpose for which the allotted Indian lands are sought to be acquired herein is for an important purpose and would prove of general and great public benefit not only to the whites, but to the Indians as well. It is recognized that modern civilization requires and demands a modern system of roads in order to take care of the increasing transportation problems of the State and Nation.

The Circuit Court in its opinion (R. 84-92) apparently relies on two cases in substantiation of its interpretation of the Act of March 3, 1901, 25 U. S. C. A. 357, namely the Utah Power and Light Company v. United States, 243 U. S. 389, and the case of United States v. Colvard, 89 Fed. (2d) 312, which cases, it is pointed out, are in no manner related or determinative of the legal effect or interpretation of Section 357 supra, and neither do these decisions in any way aid or assist in the solution of the present controversy, for the reasons hereinbefore stated.

Utah Power and Light Company vs. United States, supra, is a case where the power company, without the benefit of any condemnation proceedings or without seeking and obtaining the permission of the Secretary of the Interior, trespassed upon a Federal forest reservation by the installation of certain power lines constructed thereon. The United States brought an action to eject the power company, and

were successful in so doing, the court holding that the power company must comply with the regulations of the Secretary of Interior or move off the Federal forest reservation. This case concerned Federal forest lands and not Indian reservation lands or the type of land concerned in this case, namely, lands allotted in severalty to individual Indians. Naturally there was no construction placed by this court on Section 357 supra, and inasmuch as the power case and the instant case concern two different matters, as well as Federal statutes, it is apparent that no parallel can be drawn between the two which would be in any way effective or determinative of the question raised in the instant case. The Circuit Court in its opinion wholly failed to differentiate between the Utah Power and Light Company case and the instant case and it is urged that the Utah Power and Light Company case supra, can in no manner be controlling as to the interpretation and practicable construction given for over thirty years as to Section 357.

The Circuit Court, as the other main authority purporting to substantiate its decision, cites and quotes from a decision of the Circuit Court of Appeals of the Fourth Circuit, United States vs. Colvard, 89 Fed. (2d) 312 (R. 90). The Court states that this case involves the building of a highway across lands held by the United States *in trust for two Indians*. This is in error as the Colvard case does not state that such is the case, and in truth and in fact, the lands involved in that case were held by the United States in trust for the Eastern Band of Cherokee Indians. We have examined the record and briefs in that case. Briefly, the facts are that the Eastern Band of Cherokee Indians conveyed tribal land by deed dated July 21, 1925, to the United States of America in trust for said tribe and for the uses and pur-

poses of the Act of June 4, 1924, 43 Stat. L. 376. The land was so held by the United States and *was not allotted to any individual Indians.* The defendants in that case had a saw mill adjoining the premises owned by the United States and in order to obtain access to said sawmill, had constructed a cartway over and across said tribal lands. They had been notified to desist and later undertook to have a cartway or roadway laid out over said lands in a proceeding in the State Court of North Carolina and pursuant to North Carolina laws. Such proceedings to lay out the cartway was brought by the defendants in their own name against the Eastern Band of Cherokee Indians and against two individual Indians who resided, as occupants only, on the lands affected. The United States brought the action against Colvard et al. in the United States District Court to enjoin them from using this cartway. The main question presented in that case was whether or not said District Court had jurisdiction in the action to protect the lands so owned by the United States in trust for the Indian Tribe. The other questions raised were as to the title of the United States in said lands which was particularly a local question as there were various transfers and special acts of Congress in relation to these lands in North Carolina and affecting the Eastern Band of Cherokee Indians in said state.

The government in its brief in said case clearly set out that under the authority of the Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, that Congress could permit the condemnation of these lands in accordance with State laws, *but that there was no specific Act of Congress applicable to this case granting condemnation.* The brief referred to Section 4 of the Act of March 3, 1901, 25 U. S. C. A. 311, which does not grant condemnation but merely

gives the Secretary of the Interior power to authorize the establishment of highways through any *Indian Reservation*. Section 3 of the Act of March 3, 1901, 25 U. S. C. A. 357, is not mentioned in any of the briefs submitted in that case for the obvious reason that said section did not apply to the lands therein involved as such lands were not allotted Indian lands. The two Indians named in the proceedings to acquire the cartway were merely occupants and did not hold trust patents from the government. The government particularly brings this out in its Reply Brief and stated it does not appear in this case that there are "individual Indians claiming this property".

The Circuit Court in the instant case in its opinion was, therefore, obviously in error in stating that the lands were held by the United States in trust for two Indians which would imply allotments to two Indians. We, therefore, strenuously urge that the case of United States vs. Colvard *supra*, does not fortify or harmonize with the decision of the Circuit Court in this case.

It is, therefore, urged that this court grant petitioner a writ of certiorari for the reasons hereinbefore stated as this case presents the interpretation of a federal statute, which interpretation for over thirty years has been construed and followed according to the Department having its administration until the decision rendered by the Circuit Court in this case which is in direct conflict with such interpretation and with the only reported case, Shell Petroleum Corporation vs. Town of Fairfax, *supra*. It is, therefore, necessary that the Federal statute, Section 357 *supra*, be construed in order that a uniform interpretation throughout the Nation might be adopted and not one construction placed in the State of Oklahoma, as evidenced by the case cited *supra*,

Shell Petroleum Corporation vs. Town of Fairfax, and another construction and practice followed in the State of Minnesota where similar allotted Indian lands are situated and perhaps a further construction in other states, notably Montana and Utah. It is further urged that if the judgment and decision of the Circuit Court in the instant case be made final, it will work irreparable harm and damage to the State of Minnesota inasmuch as the State has heretofore commenced and concluded numerous condemnation proceedings for the acquirement of right of way for trunk highway purposes through lands allotted in severalty to individual Indians, pursuant to Section 357 and the land decisions and regulations of the Interior Department.

It is urged that Section 357, which concerns only the condemnation for public purposes of lands allotted in severalty to individual Indians, not only expressly grants the authority and consent of Congress to the State to so condemn, but also makes it unnecessary for the State to make the United States a party to the proceeding. Such was the decision in this case of the Federal District Court, District of Minnesota, contained in its order granting the State's condemnation (R. 58), and such was the decision of the Oklahoma State Supreme Court in the case of Shell Petroleum Corporation vs. Town of Fairfax, *supra*. Although the State did make the United States as a party respondent, yet same was unnecessary in view of Section 357, the Treaty discussed hereafter, the Land Decisions *supra*, the Federal District Court's decision in this case, and the judgment of the Supreme Court of Oklahoma in the case of Shell Petroleum Corporation vs. Town of Fairfax, *supra*.

B.

Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving, January 14, 1889 (25 Stat. 642) expressly grants lands necessary for highways, etc., through the reservation upon payment of just compensation.

The Circuit Court erred in its failure to pass upon the legal effect, intent and purpose of the Treaty and particularly that portion of Article 3 as follows:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The court entirely ignored this basic covenant running with the land, as well as the fact that the very lands concerned with herein are lands embraced within the Indian Reservation created by virtue of said Treaty of September 30, 1854. The court likewise ignored the Act of Congress approving this Treaty on January 14, 1889, as evidenced by 25 Stat. 642. Not only the Treaty, but also the Act of Congress itself; by the very terms thereof, grants the right of way through the reservation for all necessary roads, highways and railroads, the only condition being that compensation must be paid as in other cases. This the State has done as in its eminent domain proceedings, commissioners were appointed and report duly filed with the clerk of the Federal court. In addition thereto, it is pointed out that the files and proceedings will show that no appeals were taken from any of the awards and the State has subsequently deposited for the use and benefit of the allottees the full amount of the awards of damages assessed or ascertained by the commissioners appointed by the courts. Not only is it imperative and neces-

sary to construe Section 357 supra, but likewise the terms of the Treaty concerned with herein as above quoted, as well as the Act of Congress approving the Treaty. We are unable to find any construction or interpretation of the provision of this part of the Treaty or the subsequent Congressional act approving such Treaty. The Circuit Court ignores the question. We urge that the question is important and that the right to so construct roads through lands of this type providing compensation be paid, should be interpreted so that it may be known whether the language of the Treaty and the Congressional approval means what it so plainly states or is a nullity and surplusage.

We find numerous citations interpreting treaties and the weight placed upon the terms thereof, and we find that it is the generally accepted theory of this court that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. Suffice it to cite a few cases.

In the case of Leavenworth L. & G. R. Company vs. U. S., 92 U. S. 733, it is held that treaties, like statutes, must rest on the words used; nothing adding thereto, nothing diminishing. This court held in the case of Shew Heong vs. U. S., 112 U. S. 536, that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. And again in the case of Baldwin vs. Franks, 120 U. S. 678, it is held that treaties made by the United States and in force are a part of the supreme law of the land and are as binding within the territorial limits of the State as they are elsewhere throughout the dominion of the United States. Also in the case of Kenneth vs. Chambers, 14 How. 38, it is held

that treaties while they remain in force are by the Constitution of the United States binding not only upon the government, but upon every citizen. Such clear, concise and convincing language and interpretation placed upon the treaties by this court must mean that it was the clear intent of not only the Federal government but of the Indians themselves when the Reservation was created, to provide for the future development of such territory by the opening of roads and railroad lines and other facilities and that the Indian, even as the white man, would likewise have these conveniences.

The question of the Treaty and particularly Article 3, granting this right, was directly raised by the State before the Circuit Court, but no reference as to this covenant or right granted is mentioned anywhere in the opinion. It is urged that the terms of the treaty alone would be sufficient unto itself to grant the right of the State to locate and construct this major constitutional trunk highway as required by the mandate of the people in the exercise of its governmental function, providing only that compensation shall be paid for such land taken. It is, therefore, recommended and urged that unless and until such time as the Treaty concerning this particular reservation and a Congressional Act abrogates the terms of such Treaty and prior approval of the Act of Congress, that the language used in Article 3 is in truth and fact a covenant running with the land and, a standing invitation to the State to so construct roads through such reservation. It is submitted, therefore, that the Treaty and Act of Congress approving same, grants the right and authority to the State to acquire, by purchase or condemnation, the necessary land of the Indians for highway purposes.

At the risk of repetition we urge the court to grant this writ of certiorari to petitioner so that the part of the Treaty

concerned herein and the subsequent Congressional act may be construed in order that the rights of the State of Minnesota so to condemn said lands under such Treaty and Congressional Act may be determined.

C.

The State's inherent power of eminent domain should permit the acquisition for highway purposes of lands allotted in severalty to Indians regardless of express Congressional authority therefor.

In the petition for certiorari herein we raise this legal proposition in the third question presented. While reliance is made in this case on the Act of Congress permitting condemnation of allotted Indian lands, and on the Treaty of September 30, 1854, we believe that this court should also pass directly upon the question as to the exercise of the sovereign power of the State to acquire by eminent domain proceedings the necessary easement for a constitutional state trunk highway. Eminent domain is without question one of the highest attributes of the sovereign. In many of the earlier decisions the validity of the exercise of this right of eminent domain by the State over the lands of the United States was recognized. *United States vs. Railroad Bridge Company*, 6 McLean 517, Fed. Case No. 1614; *United States v. Chicago*, 7 How. 185, 12 L. ed. 660; *Ill. C. R. Co. v. Chicago B. & N. R. Co.*, (C. C.) 26 Fed. 477. In *U. S. v. Railroad Bridge Company* supra, the question involved was whether or not the State could acquire an easement for a roadway over lands owned by the United States. The court stated that the power has been exercised by all the States in which public lands of the United States have been situated and that

such power is essential to the prosperity and advancement of the country. The court further said:

"It is difficult to perceive on what principle the mere ownership of land by the general government within a state should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it."

Apparently this theory of law was followed by the States, at least until 1917. As heretofore called to the attention of the court, so far as Indian lands were concerned, the Department of the Interior on June 25, 1891, held that a State could condemn allotted Indian lands for a public purpose, 19 Land Decisions 24, *supra*.

The Circuit Court in the instant case quotes from the case of Utah Power and Light Company v. United States, 243 U. S. 389 (R. 88), which case was decided in 1917. We also call the attention of the court to the case of the same title, Utah Power and Light Company v. United States, 230 Fed. 328. These cases involve the placing of power lines across a Federal forest reservation without the right being acquired by condemnation proceedings or permission of the Secretary of the Interior. The United States brought the action to eject the power company and one of the defenses raised was that the power company could have acquired the right over and across such lands by condemnation proceedings. The courts in both cases dispose of this theory by holding to the effect that the public lands involved are not subject to the State's power of eminent domain without the consent of the United States. As will be noted, neither of these cases involved a condemnation proceedings brought by the State it-

self against lands of the United States for a public purpose, and particularly as important a public purpose as the acquisition of an easement for a major constitutional State trunk highway required under the State's constitution and laws.

We deem it of the utmost importance that this court pass on this question at this time, particularly where the State is directly involved and also because of the great change in conditions since 1917.

In recent years the national government has, to an enormous extent, acquired vast areas of land in the states of the Union for various governmental purposes. These acquisitions have been made for wild life game refuges, forest reserves, rural re-settlement rehabilitation, housing, dams, power plants, and other public projects of various natures.

This court has been called upon in the past year or two to rule as to the concurrent jurisdiction over lands acquired by the government in these great projects. We refer, for instance, to the case of Silas Mason Company v. Tax Commission, decided December 6, 1937, 302 U. S. 186. We also refer to James v. Drivo Contracting Company, 302 U. S. 134, decided the same date, and we quote from page 148 thereof, as follows:

"The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the States are acquired."

If these vast areas acquired by the Federal government are to prove an insurmountable barrier insofar as the exercise of the State governmental functions are concerned, then in-

deed would chaos reign. This court has recognized the necessity of both the Federal and State governments cooperating for the public good where the State's performance of its required governmental functions would not be prejudicial, but in fact, be beneficial to the public. Such lands should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose.

VI.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrate clearly that the decision of the court below is erroneous and that the questions raised are important, necessitating a final determination by this Honorable Court.

WHEREFORE, petitioner respectfully requests that this Court grant the writ of certiorari prayed for herein.

Respectfully submitted,

WILLIAM S. ERVIN,

Attorney General State of Minnesota,

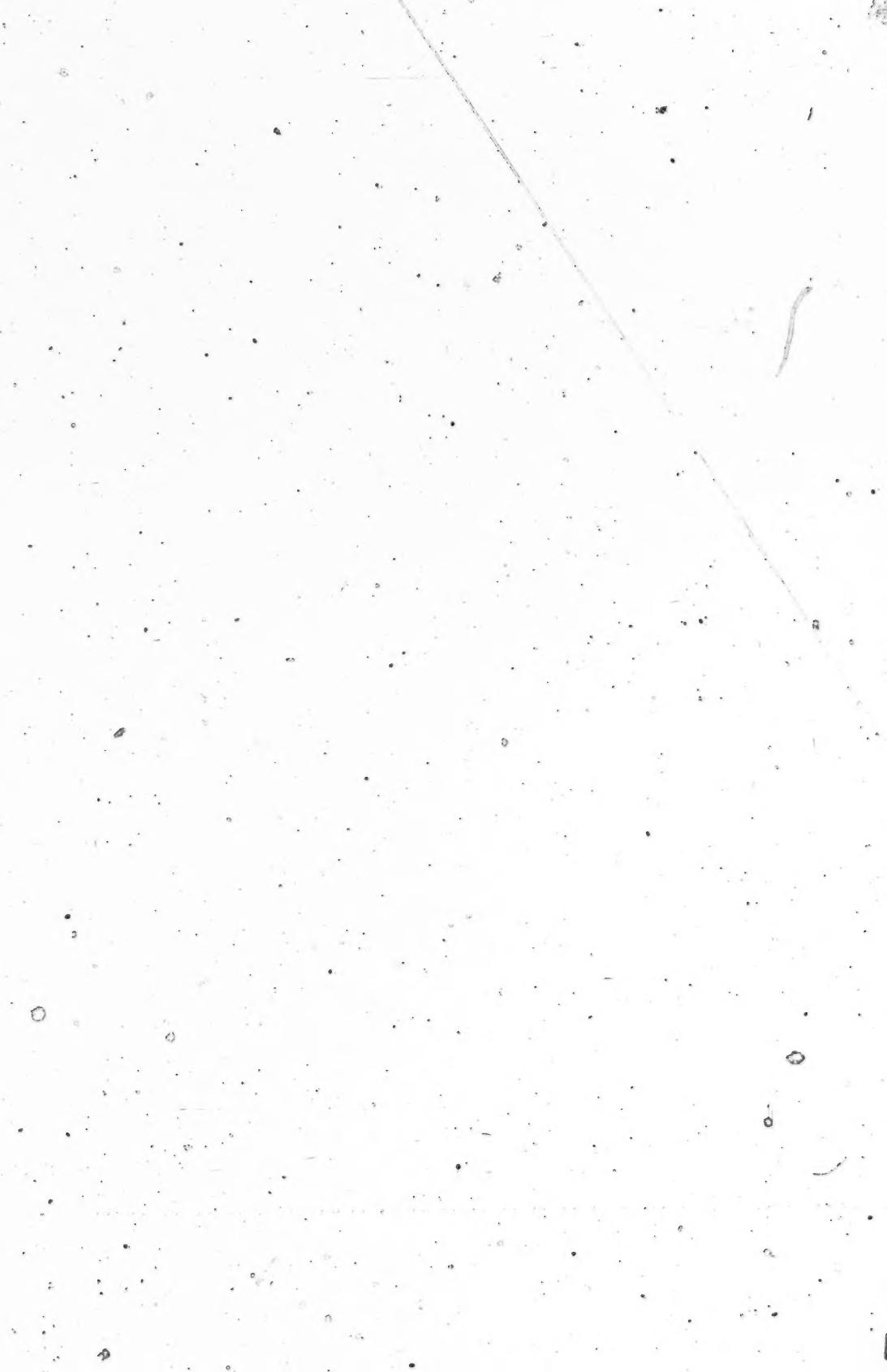
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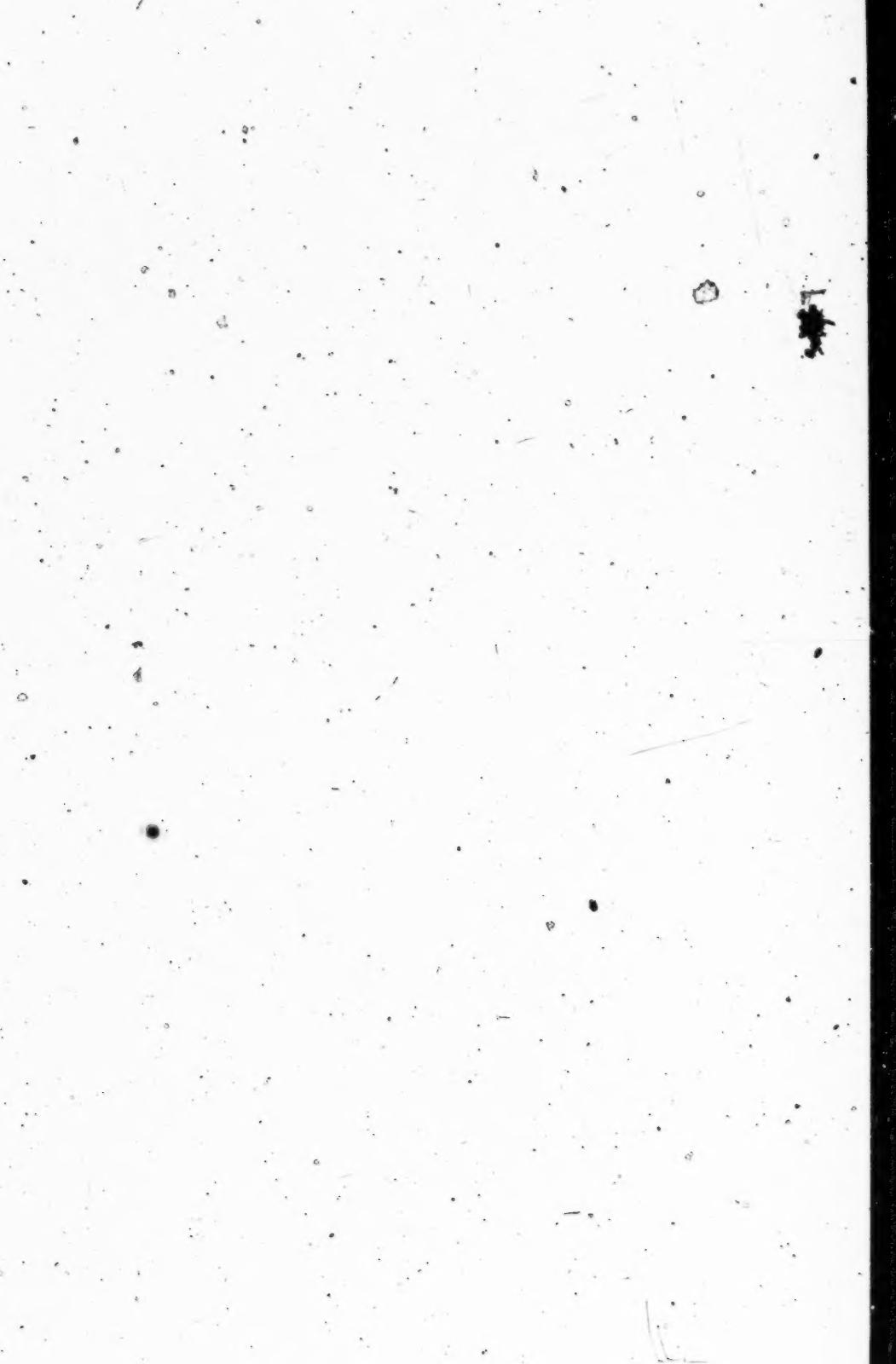
STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF THE STATE OF MINNESOTA.

WILLIAM S. ERVY,
Attorney General,

ORDNER T. RUNDLIE,
Assistant Attorney General State
of Minnesota,
Attorneys for Petitioner.



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IN THE
**Supreme Court of the
United States**

October Term, 1938

No. 73

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF OF THE STATE OF MINNESOTA.

STATEMENT.

Petitioner, State of Minnesota, submits this reply brief for the purpose of calling to the Court's attention material

matters contained in respondent's brief which, if left unchallenged, might tend to confuse and becloud the issues in this important case. Petitioner takes sharp issue with respondent on two major statements or representations contained in respondent's brief in opposition, separately stated herein.

I.

THE CASE OF UNITED STATES v. COLVARD, 89 F. (2d) 312 (C. C. A. 4th) IS NOT APPLICABLE TO THE INSTANT CASE AS THAT CASE ONLY CONCERNS TRIBAL LANDS.

The Court's attention is first invited to page 4, the last sentence of the first paragraph of the brief of the United States in opposition to the State's petition for writ of certiorari, as follows:

"Accordingly, in United States v. Colvard, 89 F. (2d) 312 (C. C. A. 4th) a decree condemning allotted Indian lands for purposes of a highway, where the permission of the Secretary of the Interior had not first been obtained, was held to give no title."

Petitioner's brief, on pages 30, 31 and 32 thereof, presents a full discussion of that case and definitely points out that the Colvard case concerns the building of a cartway across *tribal lands* and *not lands allotted in severalty to individual Indians*. Allotted Indian lands are the only type of lands concerned with in the instant case.

The Colvard case was not cited in any of the briefs before the Circuit Court but was first mentioned in oral argument by respondent's attorneys, at which time it was represented and stated to the Court that the case involved allotted Indian lands. Apparently the Circuit Court assumed that the Gov-

ernment attorneys were fully cognizant of the facts in the Colvard case for that Court fell in error by assuming that the Colvard case concerned allotted Indian lands. The Circuit Court's opinion with reference thereto states:

"In U. S. v. Colvard, 89 Fed. (2d) 312, that court held that it was not only the right, but the duty of the United States to enjoin individuals from building a highway across lands held by the United States in trust for two Indians." (R. 90)

The State's brief in support of its petition for writ of certiorari fully discusses the Colvard case and expressly points out that the facts of the case relate solely to tribal lands and that case does not in any manner consider the Federal statute pertinent hereto, namely Section 357 (25 U. S. C. A.). Notwithstanding the fact that the Colvard case is not in point, respondent's attorneys still persist that the Colvard case does apply to allotted Indian lands and is applicable. The seriousness of this misrepresentation of fact is obvious.

It is emphasized that the only type of land concerned in this litigation is land allotted in severalty to individual Indians which, under Section 357 (25 U. S. C. A.) may be condemned under State laws for any public purpose. It is further emphasized that there is no express statutory authority granting the right to the State or anyone to condemn Indian tribal lands.

As set forth in the State's petition and brief in support thereof, the State mainly relies upon said Section 357 of 25 U. S. C. A. which expressly authorizes condemnation for public purposes of lands allotted in severalty to individual Indians.

II.

THE INTERPRETATION OF SECTION 357 (25 U. S. C. A.) IS OF GREAT IMPORTANCE AND HAS NOT HERETOFORE BEEN CONSTRUED BY ANY FEDERAL COURT.

The Courts attention is next directed to the Government's brief in opposition, page 6, paragraph 2, the last sentence thereof, reading as follows:

"This decision presents no question of general importance and is not in conflict with that of any other Federal court."

There is no other Federal decision construing or involving the interpretation of Section 357 (25 U. S. C. A.) which grants permission to condemn under State laws for public purposes lands allotted in severalty to individual Indians. Naturally there is no conflict as there is no Federal decision. However, the Circuit Court's decision in the instant case is in direct conflict with the case of Shell Petroleum Corporation vs. Town of Fairfax, 180 Okl. 326, 69 Pac. (2d) 649, which construes said Section 357 of 25 U. S. C. A. and upholds the right to condemn allotted Indian lands. The Shell Petroleum Company case is, therefore, consistent with the Department of Interior's interpretation of said Section 357 as fully discussed in the State's brief.

CONCLUSION.

The State argues that the instant case presents a substantial question of general importance, notwithstanding the Respondent's assertions to the contrary. The State has attempted to present fairly to the Court the issues involved and the general importance of this case to every State in the Union wherein are located lands allotted in severalty to in-

dividual Indians. If the Circuit Court decision is upheld, the result will be to disrupt the practice and procedure of over thirty years' standing consistently adopted and followed, both by the Federal Government and the States. It is pointed out that this case affects a major national trunk highway beginning at the border of Canada and traversing the entire breadth of the United States. If the Circuit Court's decision is not reviewed, and is permitted to stand, it will create chaos and confusion and will nullify a great number of eminent domain proceedings hereofore brought and successfully concluded by the State of Minnesota and other States, taking allotted Indian lands for public purposes.

Therefore, it is respectfully submitted that the petition be granted.

WILLIAM S. ERVIN,
Attorney General,

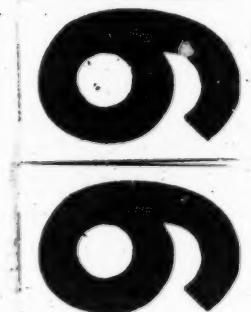
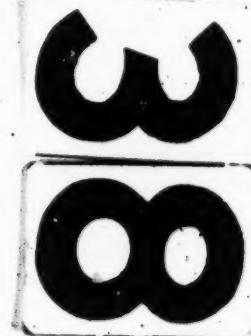
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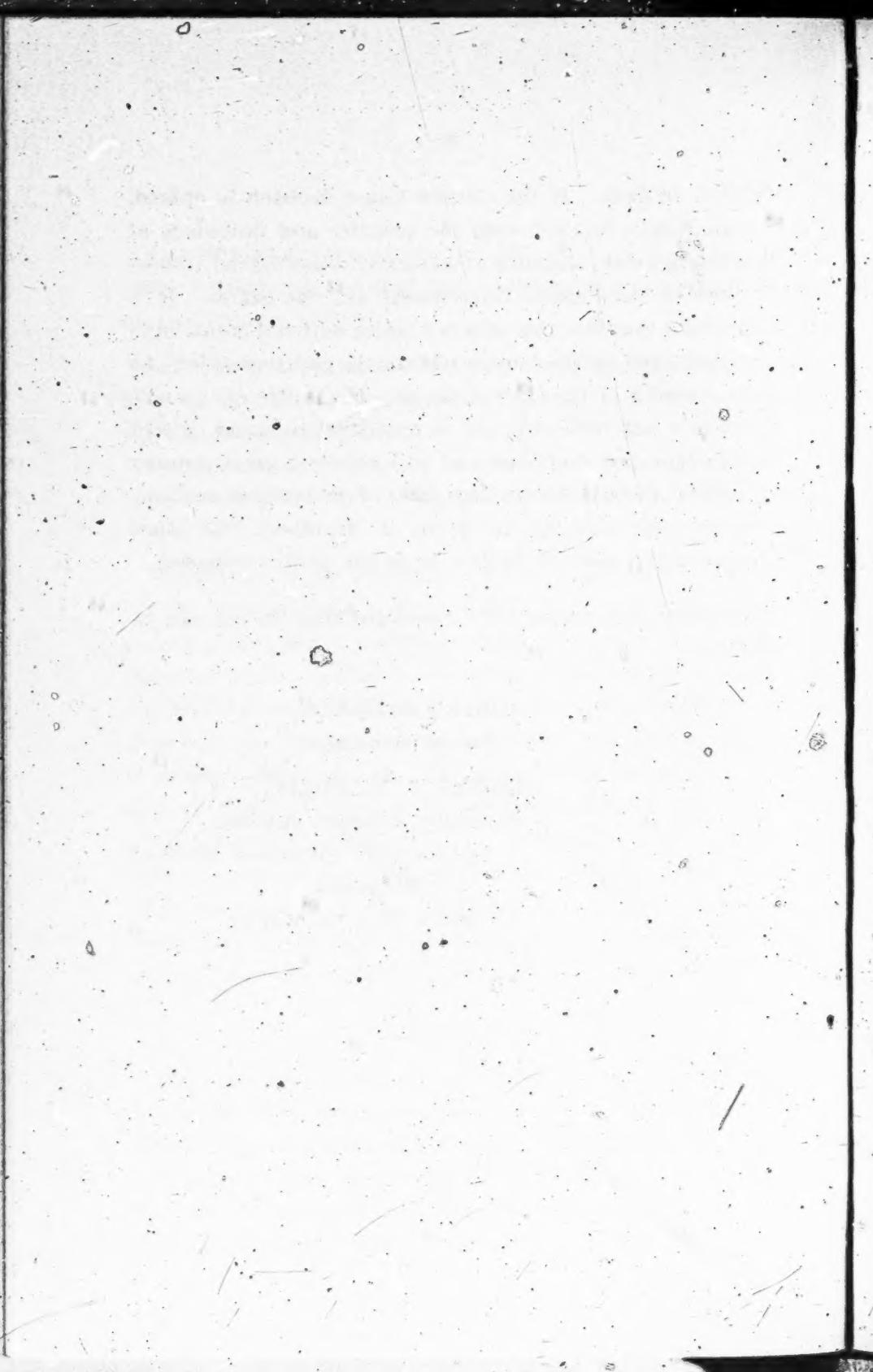
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United States

October Term 1938

No. 73

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR STATE OF MINNESOTA.

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IN THE
**Supreme Court of the
United States**

October Term 1938

No. 73

STATE OF MINNESOTA, by its Attorney General,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR STATE OF MINNESOTA.

I.

OPINIONS BELOW.

The order granting condemnation to the State by the Federal District Court, District of Minnesota, Fifth Division, appears in the Record at page 58 and no opinion has been made. The opinion of the Circuit Court of Appeals for the

2

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Eighth Circuit is found in the Record at page 84 and is reported in 95 Fed. (2d) 498.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals, Eighth Circuit, to be reviewed was dated and entered March 12, 1938 (R. 82). Petition for writ of certiorari was filed on May 31, 1938, and granted on October 10, 1938. Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

This proceeding originated in an action by the State of Minnesota through its Attorney General and at the request of its Commissioner of Highways to condemn an easement for trunk highway purposes in Cook County, Minnesota, on lands allotted in severalty to individual Indians. The proceeding was commenced in the State District Court, Eleventh Judicial District, Cook County, Minnesota, on February 6, 1936 (R. 1-11). The condemnation was instituted in the furtherance of the permanent location and subsequent construction of constitutional route No. 1, now known as state trunk highway No. 61 and United States highway No. 61, as authorized by Article 16 of the State Constitution and the Public Highways Act, Chapter 323, Session Laws of Minnesota of 1921. The easement sought was for right of way for trunk highway purposes, concerning nine non-contiguous, separate parcels of land which had been allotted in

severalty to individual Indians by the issuance of trust patents. The lands allotted in severalty to such individual Indians form a part of the Grand Portage Indian Reservation granted for the use and benefit of the Grand Portage Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and an Act of Congress approving January 14, 1889 (25 Stat. 642).

This reservation is located on the north shore of Lake Superior in Cook County in the extreme northeastern part of the State of Minnesota. Of the original area of the reservation, approximately 25,000 acres were allotted in severalty to Indians of the Grand Portage Band and approximately 16,000 acres were open for public settlement. The present location of state trunk highway No. 61, as it traverses Cook County, Minnesota, is now on a temporary route only. The temporary trunk highway as now situated in Cook County, is a narrow winding road, originally a logging road and then a county highway which was temporarily taken over by the Highway Department until such time as the Commissioner of Highways, pursuant to law, would make a permanent location of the highway through Cook County. Mason's Minnesota Statutes for 1927, Section 2554, Subdivision (3), thereof, provides in effect that until such time as the Commissioner of Highways may definitely locate and permanently construct the several routes of the trunk highway system, he shall select practical routes along the general location, as set out in Article 16 of the Constitution, which routes are to be known as temporary trunk highways and be maintained for the benefit of the traveling public until such time as a permanent location is made. The present location in Cook County is, therefore, but a temporary one and this proceeding concerns the acquirement of the right of way for the permanent or final location of the road.

4

In the early part of the year 1934, the Highway Commissioner of the State of Minnesota determined to make the permanent location of trunk highway No. 61 in Cook County. Under Article 16 of the Constitution of the State of Minnesota this highway is designated as beginning at a point on the boundary of the States of Minnesota and Iowa and thence extending northerly through the city of St. Paul and thence in a northeasterly direction to a point on the boundary line of the State of Minnesota and the Province of Ontario in the Dominion of Canada. The part of the highway now affected by the permanent location of the road in Cook County lies between the boundary line of the State of Minnesota and the Province of Ontario and the Reservation River in Cook County, Minnesota. On February 15, 1934, the Commissioner of Highways filed, pursuant to law, his center line and width orders designating the permanent location; which orders are found in the record, as petitioner's Exhibits 1 and 2 (R. 41, 44).

After the filing of these permanent orders definitely locating the trunk highway in question, the State of Minnesota did acquire by purchase and by the exercise of the power of eminent domain, easements along the entire line of said trunk highway from Reservation River to a point approximately one and a half miles west of the Village of Grand Portage except over and across the nine noncontiguous parcels of allotted Indian lands concerned in this case. The permanent location from a point one and a half miles west of said Village of Grand Portage to the Canadian boundary has likewise been permanently located by the commissioner of highways and while the permanent location of the trunk highway through Cook County, affected herein, is entirely within the Indian Reservation, yet the only allotted Indian lands affected are those concerned with in the present

proceeding, in addition to a separate condemnation covering one parcel of allotted Indian land now pending in the State court.

Subsequent to the commencement of the proceeding a stipulation dated April 7, 1936, was entered into between the State and the United States Attorney for the District of Minnesota (R. 24), providing for the removal of the case from the District Court, Cook County, Minnesota, Eleventh Judicial District, to the United States District Court for the District of Minnesota, Fifth Division, and under order dated April 8, 1936, pursuant to said stipulation, the State court ordered the removal of the case for hearing and further proceeding to the Federal District Court (R. 25). Such stipulation also provided, in part, "at which time the petition of the State of Minnesota may be heard and such proceedings had thereon as prayed in the said petition" (R. 25).

The condemnation petition came on for hearing before the Federal District Court, District of Minnesota, Fifth Division, on September 16, 1936, at which time the State presented its petition and the Court received in evidence such center line and width orders, as well as a map showing the specific parcels of allotted Indian lands sought to be acquired for trunk highway purposes (R. 48-49). The United States appeared specially, objecting to the granting of the petition and sought a dismissal of the proceedings on the ground, among others, that the court was without jurisdiction for the reason that the United States had not consented to the maintenance of the condemnation suit against it (R. 48).

On December 23, 1936, the said Federal Court made and entered its order denying the motion of the United States and granting in all things the petition of the State of Minnesota (R. 58), expressly adjudging "that the consent of the

United States to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 U. S. Code Annotated, Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings" (R. 59).

The United States on March 18, 1937, appealed from such order granting the State's condemnation to the Circuit Court of Appeals, Eighth Circuit (R. 69), and pending such appeal the State made a motion for dismissal thereof on the grounds that the order was not appealable and that the appeal was prematurely and untimely made (R. 71), which motion was denied by the Circuit Court without prejudice to the State to renew the motion in connection with the presentation of the merits of the case (R. 73). On March 12, 1938, the Circuit Court rendered its decision and judgment reversing the lower Federal Court and directing a dismissal of the condemnation proceeding (R. 82). The mandate was issued to the lower Federal Court, March 31, 1938 (R. 84). The State made due petition for writ of certiorari which was granted by this Court on October 10, 1938.

IV.

QUESTIONS PRESENTED.

1. Whether or not Section 3 of the Act of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A. Sec. 357) authorizes the State of Minnesota to condemn under its State laws for State trunk highway purposes lands allotted in severalty to individual Indians in the same manner as though the Indians were the fee owners thereof, and grants consent thereto without making the United States a necessary party to said proceedings.

2. Whether or not the Treaty of September 30, 1854 (10 Stat. 1109) with the Grand Portage Band of Chippewa Indians of Lake Superior, and the subsequent Act of Congress approving same January 14, 1889 (25 Stat. 642) expressly grants to the State the authority to construct highways over and across lands allotted in severalty to individual Indians, upon paying just compensation therefor as provided by the last sentence of Article III thereof as follows: "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

3. Whether or not the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional State trunk highway required to be so located and constructed by its Constitution and laws, may exercise its inherent power of eminent domain for such purposes over and across lands allotted in severalty to individual Indians, either with or without express Congressional authority therefor.

V.

STATUTES, TREATY AND STATE CONSTITUTION INVOLVED.

There are four statutes primarily involved in this case, as follows:

(a) Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084 (25 U. S. C. A. 357) as follows:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as

land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

(b) Act of March 3, 1901, Chapter 832, Section 4, 31 Stat. 1084, (25 U. S. C. A. 311), which provides:

"The Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

(c) Act of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 319) providing at the beginning of said Act:

"The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines * * * through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, * * *. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval, * * *"

(d) Treaty between Federal Government and the Grand Portage Band of Chippewa Indians of Lake Superior, dated September 30, 1854, (10 Stat. 1109) and the Act of Congress

approving January 14, 1889, (25 Stat. 642), the salient portion of the Treaty found in the last sentence of Article III thereof, as follows:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

(e) Constitution of the State of Minnesota, Article 16, Section 1 thereof, as follows:

"There is hereby created and established a trunk highway system, which shall be located, constructed, reconstructed, improved and forever maintained as public highways, by the State of Minnesota. The said highways shall extend as nearly as may be along the following described routes, the more specific and definite location of which shall be fixed and determined by such boards, officers or tribunals, and in such manner, as shall be prescribed by law, but in fixing such specific and definite routes there shall not be any deviation from the starting points or terminals set forth in this bill, nor shall there be any deviation in fixing such routes from the various villages and cities named herein, through which such routes are to pass."

Route 1 thereof, described in the Constitution, is the location of the trunk highway concerned herein.

(f) Section 2534, Subdivision 1, Mason's Minnesota Statutes 1927, a portion thereof, concerning the powers of the commissioner of highways, as follows:

"The commissioner of highways is empowered to carry out the provisions of Section 1 of Article 16, of the Constitution of the state, and is hereby authorized to acquire by purchase, gift, or condemnation as provided by statute all necessary right of way needed in laying out

and constructing the trunk highway system, and to locate, construct, reconstruct, improve and maintain such trunk highway system, * * *; and in carrying out the provisions of said Section 1, of Article 16 of the Constitution of the State, is hereby authorized to expend out of the trunk highway fund such portions thereof as may be available for the purposes herein provided, * * *

VI.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in reversing with direction to dismiss the order of the District Court of the United States, District of Minnesota, Fifth Division, granting the State's condemnation.
2. The Court erred in construing Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) as being subordinate and subject to the consent of the United States to the State's condemnation proceedings, and that the State's condemnation for the opening of the state trunk highway was conditioned upon such consent as provided in Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311).
3. The Court erred in failing to interpret and construe the Treaty between the Federal government and the Grand Portage Band of Chippewa Indians of Lake Superior of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642) and particularly the express right granted under the terms of the treaty as approved by Congress which, under Article 3, the last sentence thereof, contained a direct covenant that "all necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of

way through the same, compensation being made therefor as in other cases."

4. The Court erred in precluding the State from exercising its inherent power of eminent domain for a public purpose necessary and requisite in the performance of a duty imposed by its Constitution and laws, requiring the State to locate and construct its trunk highway system, where such governmental function would not be prejudicial to or inconsistent with the use of said lands by the individual Indians or the Federal government.

VII.

ARGUMENT.

A.

FEDERAL STATUTE AUTHORIZES STATE'S CONDEMNATION.

1. *Section 357 (25 U. S. C. A.) authorizes and permits condemnation of allotted Indian lands for any public purpose:*

The State relies, as authority for its condemnation proceeding, upon the Act of Congress of March 3, 1901, Chapter 32, Section 3, 31 Stat. 1084, (25 U. S. C. A. 357), herein after for convenience referred to as Section 357, which by its terms expressly authorizes and consents to the condemnation of allotted Indian lands for any public purpose under the state or territorial laws where the land is located. This federal statute is so clear, concise and free from ambiguity in its meaning that there can be no plausible argument but that Congress gave its express consent to a proceeding of this kind and granted direct authority to condemn lands allotted

in severalty to Indians for any public purpose, as provided by the Act itself, as follows:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

A statute, plain and explicit in its terms, can be given only one interpretation as this Court has so aptly stated in American Express Company vs. U. S., 212 U. S. 522, page 535, as follows:

"But we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms."

The Department of Interior, having the administration of Indian lands and affairs, in construing this act has consistently followed this simple rule of construction for over thirty (30) years, as evidenced by its Land Decisions and Regulations hereinafter discussed.

The question of the right of a State or political subdivision to condemn allotted Indian lands for public purposes has been determined and settled by the Department of Interior, both prior and subsequent to the enactment of said Section 357. Prior to such enactment, the Secretary of the Interior applied to the Attorney General for an opinion on two questions, (1) "Does such right of eminent domain exist, either in the United States government, or in the State of Montana, as warrants the taking of any part of the lands awarded to the Crow Indians in severalty for the purposes mentioned?" and (2) "In which sovereign does that right exist, the United States government, or the State?"

The opinion and answer to these questions was prepared by Assistant Attorney General Hall on June 25, 1894, and duly approved by the Honorable Hoke Smith, Secretary of the Interior, when such an opinion was adopted as a ruling of the Department. This decision is found in the decisions of the Department of Interior relating to public lands, Volume 19 Land Decisions 24, in which the first question is answered by upholding the right of a State to condemn allotted Indian lands for public purposes. In answer to the second question as to which sovereign has the right to condemn, the decision holds, "In conclusion it follows that the State of Montana has the right to condemn, under proper procedure, for public purposes, lands embraced in Indian allotments in said State." It therefore appears that pursuant to the Department's own decision, even before the express right to condemn as evidenced by Section 357 supra was enacted, it recognized the right of a State to condemn allotted Indian lands for public purposes and by so doing, no doubt numerous condemnations of such lands were successfully conducted by the various States and political subdivisions. Later Land Decisions of the Department issued subsequent to the enactment of Section 357, as well as the said Department's Regulations promulgated pursuant thereto, will be discussed after consideration is given to the enactment of Section 357. Suffice it to state at this juncture that such later Land Decisions and Departmental Regulations are in harmony with this first Land Decision.

2. *Section 357 is an amendment to the Act relating to Indian lands and is separate and distinct from the other provisions thereof.*

We now come to the enactment of Section 357 which is the last paragraph of Section 3 of the Act of March 3, 1901.

Said Act was primarily an appropriation act, and, in accordance with the well established practice of Congress, certain provisions of general law were added or tacked on, so to speak, to the appropriation measure. It is well known that many of the most important acts of Congress pertaining to the Indians and their lands have been enacted as "riders to the appropriation bill." The Congressional Record of the Senate of the 56th Congress, Second Session, Volume 34, Part 2, discloses such to be the case, for such record discloses said proceedings on January 25, 1901, in the Senate concerning said Section 357. The record on pages 1447 and 1448 is as follows:

"The reading of the bill was continued to the end of section 3, on page 67.

Mr. Pettigrew: The Committee on Indian Affairs authorizes me to offer an amendment, and I think it should come in at the end of section 3, after line 11, on page 67. I send it up now, and I call the attention of the Chairman of the Committee to it.

The Presiding Officer: The proposed amendment will be read.

The Secretary: Insert at the end of line 11, on page 67 the following: 'That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.'

Mr. Thurston: The Committee authorized the moving of this amendment. I will look it over.

The Presiding Officer: The reading of the bill will be continued.

The Secretary resumed and concluded the reading of the bill.

Mr. Thurston: The amendment proposed by the Senator from South Dakota is in accordance with the rec-

ommendation of the Committee, and I ask that the Senate agree to it.

The Presiding Officer: The proposed amendment will be read for the information of the Senate.

The Secretary: After line 11 on page 67 insert:

'That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.'

The amendment was agreed to."

The history of the enactment of Section 357 conclusively shows that it was offered as an amendment, separate and distinct from the other portions of Section 3, as well as all of Section 4 of the Act, and such amendment grants an additional and exclusive method, by condemnation, of acquiring allotted Indian lands for public purposes. The Circuit Court (R. ~~46~~) quotes Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311), which grants authority to the Secretary of the Interior to grant permission to proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, both through Indian Reservations or through any lands which may have been allotted in severalty to the Indians under the laws or treaties. In its opinion (R. ~~47~~) the Court also refers to the first part of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 319) which relates to the power of the Secretary of the Interior to grant rights of way ~~in the~~ nature of an easement for telephone and telegraph lines through both Indian Reservation lands and lands allotted in severalty to Indians. The last paragraph of said Section 3, being 25 U. S. C. A. 357, upon which the State relies in this proceeding, follows this

section pertaining to telephone and telegraph lines and rights of way therefor.

The Circuit Court, it is urged, is in error in interpreting the other two sections of the Act of March 3, 1901, namely 25 U. S. C. A. 311 and 319, as being controlling and decisive as to the powers of the Secretary of the Interior where a condemnation is brought for any public purpose under the terms of Section 357. It is pointed out, and here stressed, that Section 311 pertains only to the establishment of roads through Indian Reservations, including allotted Indian lands, while Section 319 pertains solely to the right of way for telegraph and telephone lines through Indian Reservations, including allotted Indian lands, both sections requiring the prior consent and permission of the Secretary of Interior. Section 357, on the other hand, is greater in scope insofar as allotted Indian lands are concerned as this section permits the acquirement by condemnation *for any public purpose*. Assuming that the State were condemning allotted Indian lands under authority of Section 357 for public park purposes, would the Circuit Court have construed such right to condemn as being subject to Section 311 which concerns only the granting of road easements? We think not.

The Circuit Court has construed the right of condemnation of the State as being subject to the permission or consent of the Secretary of Interior to so condemn. It is urged that the State's right to condemn such lands under Section 357 is a separate and distinct right as differentiated from the right of obtaining by negotiation a highway easement from the Secretary of Interior. One power is complementary of the other. It provides an alternative method of acquiring necessary easements for roadway purposes in the event the Secretary of Interior refuses to grant a highway easement.

Section 357 recognizes the power of the public agency or the State to take such lands for any public purpose. At the same time the rights of the Indian allottees who, for the purpose of condemnation under Section 357, are considered as owners in fee, are safeguarded by requiring compensation to be made for that which is taken. Sections 311 and 319 authorize the Secretary of the Interior to grant easements and permits. Section 357 upon which the State relies, gives the power to condemn. The existence of these two powers side by side, enables the parties concerned to provide for the public well-being by agreement, and if agreement be impossible, then by and through the power of eminent domain. They are distinct and separate remedies.

In this connection it is worthy to note that the compilers of United States Code which was adopted by the 69th Congress, have placed these three sections (311, 319 and 357) derived from the Act of March 3, 1901, separately and in their proper places with respect to the subject matter, thereby apparently following the intent of Congress. It will be noted that under Title 25 U. S. C., which pertains solely to Indians, Sections 311 and 319 are placed therein under Chapter 8 which concerns various rights of way and easements, whereas Section 357 is placed under Chapter 9 which relates to lands allotted in severalty to individual Indians.

3. Construction, interpretation and application of Section 357 by the Department of Interior.

What has been the construction of Section 357 by the Department of Interior since its enactment on March 3, 1901, and what has been the practice and procedure of that Department with relation thereto? That Department has placed its own interpretation upon Section 357 since its

enactment and has further made rules and regulations in accordance therewith. The Secretary of the Interior, in order that there might be no mistake as to the meaning and effect of Section 357, requested an opinion from the Solicitor, and on January 2, 1923, a decision was rendered by the Secretary of the Interior of the same date. This decision will be found reported in the decisions of the Department of Interior relating to public lands, Volume 49 Land Decisions, page 396. We earnestly urge the Court to read this decision in full as it reviews not only the Act of March 3, 1901, pertinent hereto, but also prior land decisions of the Department, and opinions of the Attorney General. The Circuit Court's decision is diametrically opposed to this and other land decisions, as well as the Interior Department's rulings and regulations issued in conformity therewith.

It will be noted in this land decision that the Department holds Section 357 as being an alternative remedy for the acquirement of lands for public purposes and is a separate and distinct remedy by eminent domain proceedings. Attention is particularly called to the following, found on pages 398 and 399 as follows:

"The fact remains, however, that allotted Indian lands can still be condemned for public purposes where necessary under the provisions of the Act of March 3, 1901, *supra*. In other words, the remedy resting there is simply an *alternative one rather than a concurrent or an exclusive procedure*. (*Italics ours.*) Even prior to the Act of March 3, 1901, this department held that a State could condemn allotted Indian lands for public purposes. See 19 L. D. 24. Again, the provisions of that Act came before this Department in 1905 and in an opinion dated May 11, 1905 (unreported) the then Assistant Attorney General for this Department held that under the provisions of that Act and of certain statutes

of the State of Utah, lands allotted to the Indians within the Utah Reservation could be condemned in favor of persons or corporations desiring to acquire rights of way for canals, ditches, etc. In concluding that opinion it was said: "These quotations from the law of Congress and the laws of the State answer the inquiry and leave no room for discussion or argument. Indian allotments are subject to be condemned for public purposes under the laws of the State or territory where located, before the issue of final patent, to the same extent as if the allottee held the fee to the land. The use of the land for right of way for irrigating ditches is declared by the law of Utah to be a public use in support of which the right of eminent domain may be exercised."

See 35 L. D. 648 and 45 L. D. 563.

In conformity with the Department of Interior's interpretation of Section 357 and the policy and practice consistently pursued and followed, the Department issued its printed regulations concerning "Rights of Way Over Indian Lands", printed in 1929 and issued and approved by the Department of Interior under date of May 22, 1928. Sections 68, 69 and 70 of the printed regulations, page 11, under the heading of "Condemnation of Allotted Lands", are as follows:

68. The condemnation of allotted Indian lands for any public purpose in accordance with the laws of the State wherein the lands are situated is authorized by the last paragraph of section 3 of the act of March 3, 1901 (31 Stat. L. 1058-1083-1084).

69. Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the act of March 3, 1901, above cited.

70. The superintendent or other officer in charge is expected to keep in close touch with matters affecting the interests of the Indians within his jurisdiction and

to report immediately through the Commissioner of Indian Affairs when any condemnation proceedings are instituted. All information available regarding such proceedings, particularly a description of the lands involved, should be given so that the Department of Justice may be requested to enter an appearance in such proceedings in behalf of the owners and to take such other action for their protection as may be warranted by the law and the facts."

To summarize, therefore, the Department having charge of Indian lands and affairs has, since 1894, and both prior and subsequent to the enactment of Section 357, administered and interpreted the law so as to permit and authorize the condemnation of lands allotted in severalty to individual Indians for any public purpose under the laws of the state or territory where the lands are situated and for such purpose the lands are deemed to be held in fee by Indians and damages paid to such allottees. This covers a period of over 40 years and this court has repeatedly laid down the rule that the construction and application for a long period of time of a law by the department or branch of government administering said law shall not lightly be set aside. This rule is aptly stated in the case of *Swendig vs. Washington Water Power Company*, 265 U. S. 322, concerning the interpretation by the Interior Department of certain acts of Congress relating to Indian lands as reported in Land Decisions, as follows:

"The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the execu-

tive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.' Logan vs. Davis, 233 U. S. 613, 627."

Further in the case of United States vs. Jackson, 280 U. S. 183, the court on page 193, said:

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration (cases cited); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

In construing an Act of Congress which had been interpreted in a certain manner by the War Department and opinions of the Attorney General of the United States for nearly thirty years, Chief Justice Taft in the case of Wisconsin vs. Illinois, 278 U. S. 367, on page 413 stated:

"This construction of section 10 is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. U. S. vs. Minn., 270 U. S. 181, 205; Swendig vs. Washington Water Power Company, 265 U. S. 322, 331; Kern River Company vs. U. S., 257 U. S. 147, 154; U. S. vs. Burlington & Missouri River R. R., 98 U. S. 334; U. S. vs. Hammers, 221 U. S. 220, 228; Logan vs. Davis, 233 U. S. 613, 627. The practice is shown by the opinion of the acting attorney general, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the act. This was followed by the permits subsequently granted, down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports."

It is urged, however, that Section 357 supra, is neither doubtful nor ambiguous in any sense. It is also pointed out that up to the time of the decision of the Circuit Court in this case, that there was no doubt or misunderstanding as to the construction of the terms of this statute, as evidenced by the administration of said act and the practice followed by the Interior Department. The decision of the Circuit Court in the instant case has, contrary to the Government's own regulations and Land Decisions, and the practice and procedure consistently followed, created a confused and chaotic condition jeopardizing all former condemnation proceedings through lands of this type conducted and consummated by the State of Minnesota, as well as other states.

For example, the State of Minnesota by its Attorney General during the past ten years has successfully concluded six separate condemnation proceedings for highway purposes for the taking of lands allotted in severalty to individual Indians. These proceedings were instituted and completed in the State courts and included land in Carleton, Itasca, Cass, St. Louis and Becker Counties and involved the taking for trunk highway purposes of 79 separate parcels of allotted Indian lands. In all of these condemnation proceedings the individual Indians were named as respondents, as well as the Indian Superintendents. The Department of Interior likewise in these cases fully cooperated with the State in conformity with the established practice and procedure and regulations of said Department concerning the acquirement of right of way for public purposes through such allotted lands, pursuant to the rules and regulations of the Department of Interior heretofore referred to. (Regulation 70 supra, Department of Interior). It is pointed out and stressed that the present proceeding is in all respects similar to the

other six condemnation actions. The instant case marks the first time in which the United States through the Department of Interior has objected in any wise or manner to the acquirement of right of way for a state and national trunk highway through allotted Indian lands.

In none of these cases was the express consent of the Secretary of Interior obtained, which the Circuit Court now holds to be necessary (R. 97). The State, therefore, in accordance with the Department of Interior's regulations 68 and 69 supra, conducted its condemnation proceedings pursuant to Section 357, which proceedings, the regulations state, are authorized by such section and that any purpose for which private lands could be condemned under state laws is held to be a public purpose within the meaning of said Section 357.

The clear and concise language of Section 357, together with the Federal government's own interpretation placed upon said section, as evidenced by its Land Decisions and Regulations hereinbefore quoted and consistently followed for more than thirty years, undoubtedly accounts for the great lack of reported cases concerning the right to condemn lands allotted in severalty to individual Indians. It is only at this late date and for some reason unknown to the State of Minnesota that the Department of Interior wishes to undo its interpretation of many years which has consistently been in line with good law and public policy. The United States of America and the Department of Interior, Bureau of Indian Affairs, now wishes to place a strained, unreal and unnatural construction upon this very plain statute. The State feels that the rulings of the Department should not be disturbed. To set aside such rulings would prove of great detriment to the people of the State of Minnesota and other states.

and will, in fact and in effect, prevent the Department of Highways from performing a governmental function demanded to be performed by mandate of its people through both constitutional and legislative enactments.

4. Construction of Section 357 by the Supreme Court of State of Oklahoma.

Presumably the only party who would raise the question as to the interpretation of the act would be the Federal government itself and particularly the Department of Interior. We find after diligent search of authorities only one reported case directly interpreting Section 357. This is Shell Petroleum Corporation vs. Town of Fairfax, decided by the Supreme Court of Oklahoma on June 16, 1937, and reported in 180 Okla. 326, 69 Pac. Rep. (2d) 649, wherein the court, in connection with this subject, said:

"It is next contended by the defendants in their original brief and their reply brief that even though it be granted that the town had power to condemn non-Indian land, the power did not extend to the right to condemn land allotted to a restricted Osage Indian."

In this connection reference is made to a paragraph of Section 3 of the Act of Congress of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A., Section 357), which provides 'lands allotted in severalty to Indians may be condemned' for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.'

In view of a letter purporting to be from the Commissioner of Indian Affairs, and approved by the Secretary of the Interior, dated December 24, 1936, relating to other condemnation proceedings had in the District Court of Osage County involving allotted Osage

Indian land, in which the above provision of the Act of Congress is quoted, and in which the Commissioner says, 'this law applies to Indian allotments generally, and authorizes condemnation for public purposes under the laws of the State or territory where located,' the defendants in a supplemental brief filed May 21, 1937, apparently recedes from the position first taken that said provision did not apply to allotted Osage Indian land. They now contend that if this may be done the United States is a necessary party and the proceedings cannot be had in a state court, but must be taken in a Federal court.

With these contentions we cannot agree. The Act of Congress quoted above, granting authority to condemn lands allotted in severalty to Indians, says that such lands may be condemned under the laws of the State or Territory where located. This means the land may be condemned under the provisions of the law of the State or Territory where located. If the law of such State or Territory authorizes a town to condemn land, it may be condemned only for such purposes as the law of the State or Territory may provide. It may be condemned in the same manner. That means the same court and under the same procedure as would be the case if the land were owned in fee. If the land is owned in fee, the State court has power and jurisdiction to condemn. That act confers like authority as applied to allotted Indian land. Likewise if the land is owned in fee, the owner is the only necessary defendant. The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such land without making the United States a party."

Unquestionably the State has the right to condemn for any public purpose lands owned in fee by individual per-

sons. Section 357 concerned herein, by the terms thereof and for the express purpose of condemnation for a public purpose, places allotted Indian lands in the very same category as lands owned in fee by individual or private persons. Therefore, if the State has the power of eminent domain to condemn lands owned in fee by private persons, then likewise has the State under Section 357 an equal right to condemn allotted Indian lands as such section provides specifically that the Indians for such purposes are considered the owners thereof and damages accordingly paid to them.

It is submitted that the Department of Interior, as evidenced by its Land Decisions and regulations and consistent policy pursued, has rightly interpreted the power of the State to condemn for public purposes allotted Indian lands. It must be borne in mind that this proceeding was instituted by the State of Minnesota for the location and construction of a trunk highway. It is urged that the purpose for which the allotted Indian lands are sought to be acquired herein is for an important public purpose and would prove of general and great public benefit not only to the whites, but to the Indians as well. It is recognized that modern civilization requires and demands a modern system of roads in order to take care of the increasing transportation problems of the State and Nation.

5. *The cases cited by the Circuit Court are not in point.*

The Circuit Court in its opinion (R. 84-92) apparently relies on two cases in interpreting the Act of March 3, 1901, 25 U. S. C. A. 357, namely Utah Power and Light Company vs. United States, 243 U. S. 389, and the case of United States vs. Colvair, 89 Fed. (2d) 312, which cases, it is here pointed out, are in no manner related to or determinative

of the legal effect or interpretation of Section 357 *supra*, and these decisions in no way aid or assist in the solution of the present controversy, for the reasons hereinafter stated.

In *Utah Power and Light Company vs. United States*, *supra*, the power company, without the benefit of any condemnation proceeding or without seeking and obtaining the permission of the Secretary of the Interior, trespassed upon a Federal forest reservation by constructing thereon certain power lines. The United States brought an action to eject the power company, and was successful in so doing, the court holding that the power company must comply with the regulations of the Secretary of Interior or move off the Federal forest reservation. This case concerned Federal forest lands and not Indian reservation lands or the type of land concerned herein, namely, lands allotted in severalty to individual Indians. Naturally there was no construction placed by this court on Section 357, *supra*, and ipasmuch as the power case and the instant case concern two different matters, as well as different Federal statutes, it is apparent that no parallel can be drawn between the two which would be in any way effective or determinative of the question raised in the instant case. The Circuit Court in its opinion wholly failed to distinguish between the *Utah Power and Light Company* case and the instant case and it is urged that the *Utah Power and Light Company* case, *supra*, can in no manner be controlling as to the interpretation and construction of Section 357.

The Circuit Court, as the other main authority purporting to substantiate its decision, cites and quotes from a decision of the Circuit Court of Appeals of the Fourth Circuit, *United States vs. Colvard*, 89 Fed. (2d) 312 (R. 86). That Court stated that the *Colvard* case involved the building of

a highway across lands held by the United States *in trust for two Indians.* But that statement is in error. The Colvard case in truth and in fact, relates to land held by the United States in trust for the Eastern Band of Cherokee Indians. We have carefully examined the record and briefs in that case. The facts are that the Eastern Band of Cherokee Indians conveyed *tribal land* by deed dated July 21, 1925, to the United States of America in trust for said tribe and for the uses and purposes of the Act of June 4, 1924, 43 Stat. L. 376. The land was so held by the United States and *was not allotted to any individual Indians.* The defendants in that case had a sawmill adjoining the premises owned by the United States and in order to obtain access to said sawmill, had constructed a cartway over and across said tribal lands. They had been notified to desist and later undertook to have a cartway or roadway laid out over said lands in a proceeding in the State Court of North Carolina and pursuant to North Carolina laws. Such proceeding to lay out the cartway was brought by the defendants in their own name against the Eastern Band of Cherokee Indians and against two individual Indians who resided, as occupants only, on the lands affected. The United States brought the action against Colvard et al. in the United States District Court to enjoin them from using this cartway. The main question presented in that case was whether or not said District Court had jurisdiction in the action to protect the lands so owned by the United States in trust for the Indian Tribe. The other questions raised were as to the title of the United States in said lands which was particularly a local question as there were various transfers and special acts of Congress in relation to these lands in North Carolina and affecting the Eastern Band of Cherokee Indians in said state.

The government in its brief in said Colvard case clearly set out that under the authority of the Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, Congress could permit the condemnation of these lands in accordance with State laws, but that there was no specific Act of Congress applicable to this case granting condemnation. The brief referred to Section 4 of the Act of March 3, 1901, 25 U. S. C. A. 311, which does not grant condemnation but merely gives the Secretary of the Interior power to authorize the establishment of highways through any *Indian Reservation*. Section 3 of the Act of March 3, 1901, 25 U. S. C. A. 357, is not mentioned in any of the briefs submitted in that case for the obvious reason that said section did not apply to the lands therein involved as such lands were not allotted Indian lands. The two Indians named in the proceeding to acquire the cartway were merely occupants and did not hold trust patents from the government. The government particularly brings this out in its Reply Brief and stated it does not appear in this case that there are "individual Indians claiming this property."

The Circuit Court in the instant case in its opinion was, therefore, obviously in error in stating that the lands were held by the United States in trust for two Indians which would imply allotments to two Indians.

The United States now concedes that the Circuit Court in the instant case was in error as is unmistakably evidenced in its "Supplemental Memorandum for the United States", submitted in connection with the State's petition for writ of certiorari herein. In said memorandum and in reference to United States v. Colvard, supra, it said: "The land concerned there was, as the Attorney General points out, tribal rather than allotted lands."

The Circuit Court in its decision has ignored the practical construction placed upon said Section 357 and has in effect negatived and made void the land decisions of the Department of Interior, as well as that Department's own regulations issued and consistently followed until the instant case.

6. Congress, by the enactment of Section 357 (25 U. S. C. A.) grants consent to State's condemnation of allotted Indian lands, and the United States is not a necessary party nor a real party in interest in and to the State's condemnation.

Although the State did make the United States a party in its condemnation proceeding, yet this was unnecessary as determined by the lower court order granting the State's condemnation as evidenced by said court's finding No. 2, (R. 59) as follows:

"That the consent of the United States to bring these proceedings against Indian allottees has been expressly granted and given by the United States to the State of Minnesota pursuant to 25 U. S. C. A., Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings;"

This finding of the lower trial court is in full accord and harmony with law and equity and uniform interpretation placed upon said Section 357. This finding of the lower court harmonizes with the decision of the Supreme Court of Oklahoma in the case of *Shell Petroleum Corporation vs. Town of Fairfax, supra*, wherein the court said:

"The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without

its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such lands without making the United States a party."

It is apparent that Congress in its good discretion simplified the procedure as to acquiring necessary Indian lands for State governmental functions. Congress, fully realizing the difficulty of getting the specific consent of the United States in each proceeding, enacted said Section 357 supra, and thereby granted the express right to condemn under State laws such lands for public purposes without it being necessary to make the Federal government a party respondent. Condemnation is an action in rem and the money awarded as damages stands in place and stead of the land, and consequently, the land is the subject matter of the action rather than the persons concerned therein. What interest, therefore, could the Federal government possibly have in the proceeding as it cannot share in the award for damages, or compensation? The rights of the Indians are fully protected by orderly condemnation proceedings, pursuant to State law, assuring them just compensation.

The State joined the United States of America as a party respondent primarily and only for the purpose of enabling the Federal government to act as a disbursing agency of the money awarded. The awards of compensation made by commissioners appointed by the Federal District Court (R. 67) have been paid by the State into said court to be disbursed to the Indian allottees entitled thereto under the direction of the court with the cooperation of the United States government. This is the only interest that the Federal Government has in the proceeding and, no doubt, the naming of the Indian agent as a respondent would have been sufficient in

itself. The fact that the Federal government was named as a party respondent and is not a real party in interest would, in no way, jeopardize or invalidate the legality of the proceeding or add or detract therefrom, the effect actually being the same as though the United States had never been joined as a party respondent. Section 357 authorizing the condemnation of allotted Indian lands specifically provides that the money awarded as damages shall be paid to the allottee. And therefore, insofar as payment of damages for the taking is concerned, the allottee is the same as a fee owner.

It is elementary that the United States cannot be sued without its consent given by an express act of Congress. In this case Congress has plainly, concisely and clearly given its consent to the State to condemn under its own laws lands allotted in severalty to individual Indians for any public purpose. The language is so clear and concise and so unmistakable in its terms as to leave no doubt in the mind of any reasonable person but what Congress plainly intended and did grant its consent to a proceeding of this nature.

Therefore, it is urged that Section 357, which concerns only the condemnation for public purposes of lands allotted in severalty to individual Indians, not only expressly grants the authority and consent of Congress to the State so to condemn, but also makes it unnecessary for the State to make the United States a party to the proceeding. Such was the decision in this case of the Federal District Court, District of Minnesota, contained in its order granting the State's condemnation (R. 58), and such was the decision of the Oklahoma State Supreme Court in the case of Shell Petroleum Corporation vs. Town of Fairfax, *supra*.

B.

TREATY OF SEPTEMBER 30, 1854 (10 Stat. 1109) and the ACT OF CONGRESS APPROVING, JANUARY 14, 1889 (25 Stat. 642) EXPRESSLY GRANTS LANDS NECESSARY FOR HIGHWAYS, etc., THROUGH THE RESERVATION UPON PAYMENT OF JUST COMPENSATION.

The Circuit Court erred in its failure to pass upon the legal effect, intent and purpose of the Treaty and particularly that portion of Article 3 as follows:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The court entirely ignored this basic covenant running with the land, as well as the fact that the very lands concerned with herein are lands embraced within the Indian Reservation created by virtue of said Treaty of September 30, 1854. Here again Congress by the approval of the terms of the Treaty has definitely given the consent of the United States and authorized the acquirement of all necessary roads, highways and railroads through all lands in the reservation, provided only that just compensation be paid as in other cases.

The court ignored the Act of Congress approving this Treaty on January 14, 1889, as evidenced by 25 Stat. 642. The Treaty, by the very terms thereof, grants the right of way through the reservation for all necessary roads, highways and railroads, the only condition being that compensation must be paid as in other cases. This the State has done as in its eminent domain proceeding, commissioners to ap-

praise damages were appointed and their report was duly filed with the clerk of the Federal court. In addition thereto, it is pointed out that the files in this proceeding will show that no appeals were taken from any of the awards of compensation and the State has deposited for the use and benefit of the allottees the full amount of said awards of damages assessed or ascertained by the commissioners appointed by the court. Not only is it imperative and necessary to construe Section 357 supra, but likewise the terms of the Treaty concerned with herein as above quoted, as well as the Act of Congress approving the Treaty. We are unable to find any construction or interpretation of the provision of this part of the Treaty or the subsequent Congressional act approving such Treaty. The Circuit Court ignores the question. We urge that the question is important and that the right to so construct roads through lands of this type providing compensation be paid, should be interpreted so that it may be known whether the language of the Treaty and the Congressional approval means what it so plainly states or is a nullity and surplusage.

We find numerous cases interpreting treaties and the weight placed upon the terms thereof, and it is the theory of this court that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. Suffice it to cite a few cases.

In the case of Leavenworth L. & G. R. Company vs. U. S., 92 U. S. 733, it is held that treaties, like statutes, must rest on the words used; nothing adding thereto, nothing diminishing. This court held in Shew Heong vs. U. S., 112 U. S. 536, that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation

according to the intention of the contracting parties. And again in *Baldwin vs. Franks*, 120 U. S. 678, it is held that treaties made by the United States and in force are a part of the supreme law of the land and are as binding within the territorial limits of the State as they are elsewhere throughout the dominion of the United States. Also in *Kenneth vs. Chambers*, 14 How. 38, it is held that treaties while they remain in force are by the Constitution of the United States binding not only upon the government, but upon every citizen. A more recent case interpreting an Indian treaty is *United States vs. Shoshone Tribe*, decided April 25, 1938, 58 Supreme Court Reporter 794, stating in effect that an Indian treaty should not be interpreted narrowly but is to be construed in the sense in which naturally the Indians would understand it.

Such clear, concise and convincing language and interpretation placed upon treaties by this court must mean that as to this treaty it was the clear intent of not only the Federal government, but of the Indians themselves when the Reservation was created, to provide for the future development of such territory by the opening of roads and railroad lines and other facilities in order that the Indian, as well as the white man, would have these conveniences.

The question of the Treaty and particularly Article 3, granting this right, was directly raised by the State before the Circuit Court, but no reference as to this covenant or right granted is mentioned anywhere in the opinion. It is urged that the terms of the treaty alone would be sufficient to grant to the State the right to locate and construct this major constitutional trunk highway as required by the mandate of the people in the exercise of its governmental function, providing only that compensation shall be paid for such

land taken. It is submitted, therefore, that the Treaty and Act of Congress grants the right and authority to the State to acquire, by purchase or condemnation, the necessary land of the Indians for highway purposes.

C.

THE STATE'S INHERENT POWER OF EMINENT DOMAIN PERMITS THE ACQUISITION OF LANDS ALLOTTED IN SEVERALTY TO INDIANS REGARDLESS OF EXPRESS CONGRESSIONAL AUTHORITY THEREFOR.

The argument herein is made pertaining to the third question presented and No. 4 of the specification of errors. While reliance is made in this matter on the Act of Congress expressly permitting condemnation of allotted Indian lands for any public purpose and on the Treaty of September 30, 1854, we believe that this case directly concerns the inherent power of the State to condemn lands for public purposes pursuant to State law. This question should be determined directly by this Court at this time.

This is the first instance in this Court, we believe, that a State itself in a condemnation proceeding affecting lands of the United States raises this proposition of its right to condemn such lands. It is to be noted that the state trunk highway involved in this proceeding is expressly created by Article 16 of the State Constitution. Said Article 16 obviously did not attempt to give or describe the actual location of this particular trunk highway, but merely gave the general route said highway was to take through the State from the Iowa boundary to the Canadian boundary. The power to definitely determine the permanent location of said highway

is delegated to the Commission of Highways, such permanent designation to be made by the Commissioner's filing of a permanent center line and width order actually describing the course of the road and the lands affected.

The Minnesota Supreme Court in State vs. Voll, 155 Minn. 72, 192 N. W. 188, held that Article 16 determines that the taking of the right of way necessary for the trunk highway system is for a public use and that the Commissioner of Highways and not the court under the Highway Act, Chapter 323, Laws of 1921, (Section 2554, Subd. 1, Mason's Minnesota Statutes of 1927) is the agency to determine the location of and what land is necessary for the right of way for trunk highways.

Where such designation of a trunk highway involves the taking of lands already devoted to another public use, the courts determine which public use is supreme or paramount. The United States, holding lands within the State, should be in the same category in this respect as public corporations or political subdivisions of the State, except that as to United States lands, the Federal Courts should make this determination.

Eminent domain is one of the highest attributes of the sovereign. In many of the earlier decisions the validity of the exercise of this right of eminent domain by the State over the lands of the United States was recognized. United States vs. Railroad Bridge Company, 6 McLean 517, Fed. Cas. No. 1614; United States vs. Chicago, 7 How. 185, 12 L. ed. 660; Ill. C. R. Co. vs. Chicago B. & N. R. Co. (C. C.), 26 Fed. 477. In United States vs. Railroad Bridge Company, *supra*, the question involved was whether or not the State could acquire an easement for a roadway over lands owned by the United States. The court stated that the

power has been exercised by all the States in which public lands of the United States have been situated and that such power is essential to the prosperity and advancement of the country. The court further said:

"It is difficult to perceive on what principle the mere ownership of land by the general government within a state should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it."

Apparently this theory of law was followed by the States, at least until 1917. As heretofore called to the attention of the court, so far as Indian lands were concerned, the Department of the Interior on June 25, 1894, held that a State could condemn allotted Indian lands for a public purpose, 19 Land Decisions 24, supra.

It is interesting to note that apparently prior to 1875 it was commonly believed that the United States itself could not by direct condemnation proceedings acquire property within the states for its own uses without consent of the State. This court in *Kohl vs. United States*, 91 U. S. 367, decided in 1875, discussed this theory and rightly held that the United States has the same inherent right of eminent domain as exists in the States; that the Government is as sovereign within its sphere as the States are within theirs, although its sphere is limited. This case further discussed the proposition that the two distinct and separate sovereigns within the same territorial space are independent of the other and neither is under the necessity of applying to the other for permission to exercise its lawful powers.

In *Van Brocklin vs. State of Tennessee*, 117 U. S. 151, this court discussed *United States vs. Railroad Bridge Company*

supra, as to the State's right of eminent domain over lands of the United States without the consent of the United States. As the question in that case involved taxation by a State, the court did not pass upon the eminent domain question, but said on page 162, "When that question shall be brought into judgment here, it will require and receive the careful consideration of the court." The question is now being brought directly to this court by a State itself seeking to acquire a highway right of way across allotted Indian lands held in trust by the United States.

The Circuit Court in the instant case quotes from the case of Utah Power and Light Company vs. United States, 243 U. S. 389 (R. 88), which case was decided in 1917. We also call the attention of the court to the case of the same title, Utah Power and Light Company vs. United States, 230 Fed. 328, 4 A. L. R. 535, annotated on page 548. These cases did not involve a direct condemnation proceeding against Federal lands brought by the State itself, but did involve the placing of power lines across a Federal forest reservation without the right being acquired by condemnation proceedings or permission of the Secretary of the Interior. The United States brought the action to eject the power company and one of the defenses raised was that the power company could have acquired the right over and across such lands by condemnation proceedings. The courts in both cases dispose of this theory by holding to the effect that the Federal Forest Reserve lands involved are not subject to the power of eminent domain without the consent of the United States.

While the language in these cases is strongly against the contention here raised, we believe that the facts and circumstances of said cases may have had considerable bearing in the result. These cases are certainly not in harmony with

the earlier cases heretofore cited. The importance of this court passing on this question at this time is now stressed, particularly where the State is directly involved and also because of the great change in conditions since 1917.

In recent years the national government has, to an enormous extent, acquired vast areas of land in the states of the Union for various governmental purposes. These acquisitions have been made for wild life game refuges, forest reserves, rural re-settlement rehabilitation, housing, dams, power plants, and other public projects of various natures.

This court has been called upon in the past year or two to rule as to the concurrent jurisdiction over lands acquired by the government in these great projects. We refer, for instance, to the case of Silas Mason Company vs. Tax Commission, decided December 6, 1937, 302 U. S. 186. We also refer to James v. Dravo Contracting Company, 302 U. S. 134, decided the same date, and we quote from page 148 thereof, as follows:

"The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the States are acquired."

It is obvious from the reading of these two recent cases that the question of concurrent jurisdiction over such lands is an important one. While these cases involve taxation, in effect they hold that the States are not entirely debarred from exercising their legislative authority over such lands. We believe that the mere ownership of lands in a State should not debar that State from the exercising of that attribute of sovereignty, the inherent power of eminent domain, particularly where the public purpose is as important as the

acquisition of an easement for a major constitutional trunk highway, required under the State constitution and laws, as in this case. It is obvious that such right should meet the test of the courts as to whether or not the taking is for a purpose not prejudicial or inconsistent with the use of the lands by the government. The test would be not only that, but whether the use is clearly supreme or paramount to the purpose for which it is being used, as both uses are in the ultimate taken for the public good and the people of the State and Nation. It would appear that the public would in no case be the loser. Both the United States and the States are created and operate for their citizens.

The question of paramount public use would necessarily be decided in a court of the United States. This could place no hardship upon the United States. This very feature is discussed in *United States vs. Lee*, 106 U. S. 196, which involved a claimed title to certain lands adversely to the United States, the latter title being based upon a tax title. This court said in its concluding paragraphs that no case can arise in a State Court where the interests, the property, the rights or the authority of the Federal government may come in question which cannot be removed into a court of the United States. It was said:

"The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands. * * * From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority."

If these vast areas acquired by the Federal government are to prove an insurmountable barrier insofar as the exercise of the State-governmental functions are concerned, then

indeed would chaos reign. This court has recognized the necessity of both the Federal and State governments cooperating for the public good where the State's performance of its required governmental functions would not be prejudicial, but in fact, be beneficial to the public. Such lands should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose.

VIII.

CONCLUSION.

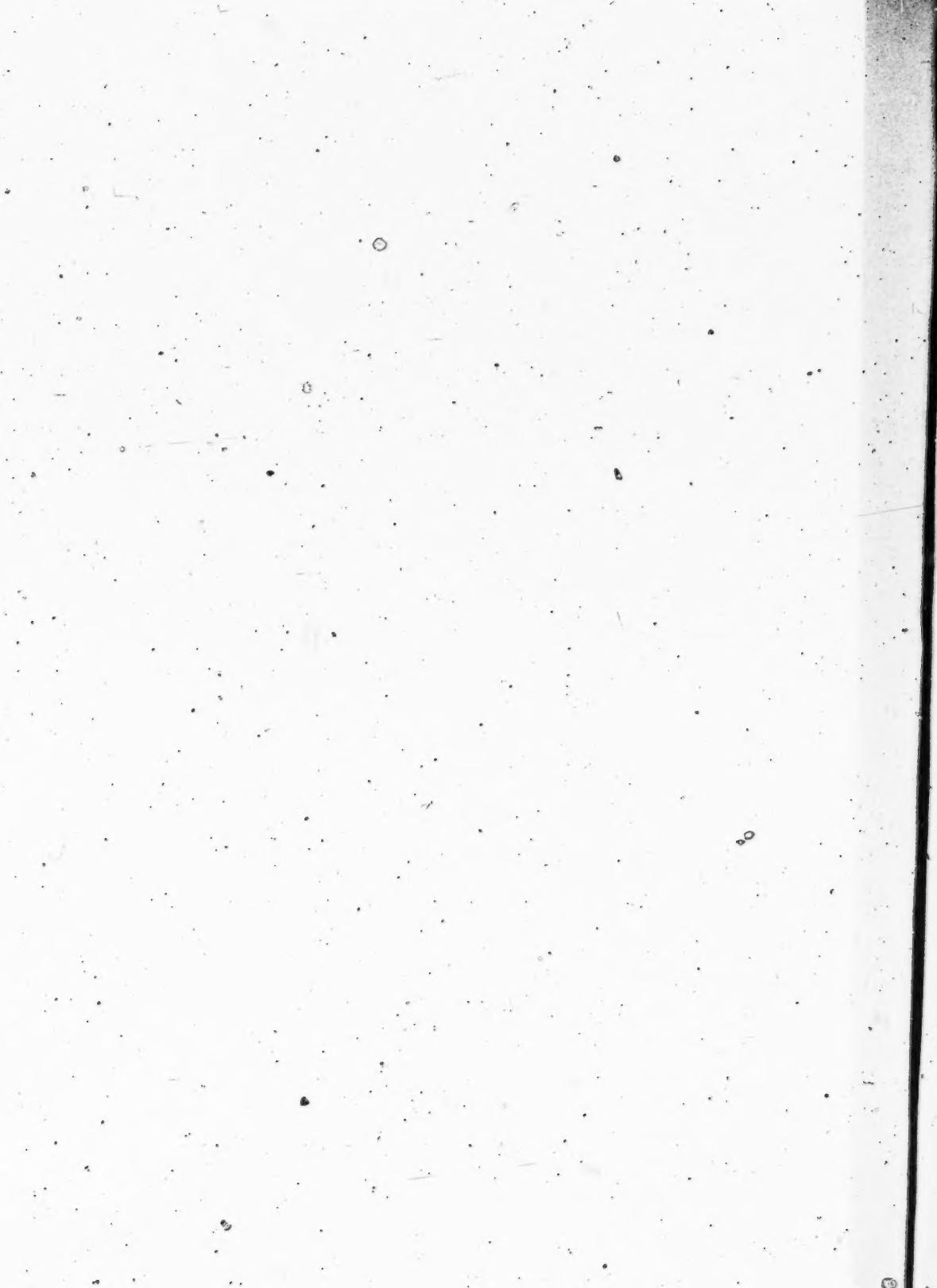
WHEREFORE, Petitioner, State of Minnesota prays that the judgment of the United States Circuit Court of Appeals, Eighth Circuit, be in all things reversed and that the order of the Federal District Court, District of Minnesota, Fifth Division, granting the State's condemnation, be in all things affirmed,

Respectfully submitted,

WILLIAM S. ERVIN,
Attorney General,

ORDNER T. BUNDLIE,
Assistant Attorney General,
Attorneys for Petitioner,
Saint Paul, Minnesota.





FILE COPY

U. S. DISTRICT COURT, D. C.

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CHARLES ELMORE DODRIDGE
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IN THE

Supreme Court of the United States

OCTOBER TERM 1938.

No. 73.

STATE OF MINNESOTA, by Its Attorney General, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR STATE OF MINNESOTA.

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IN THE
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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR STATE OF MINNESOTA.

A.

STATEMENT.

This reply brief is submitted pursuant to the Court's permission after completion of argument.

B.

ARGUMENT.

I.

Section 4 of the Act of March 3, 1901, 31 Stat. 1084, (25 U. S. C. A. 311) does not specifically apply to condemnation proceedings nor can it be so implied. The State's brief thoroughly covers the distinguishing features and proper interpretations of the Act of March 3, 1901 (31 Stat. 1084).

The Government now attempts to read into Section 4 of the Act of March 3, 1901 language relating to or which would permit condemnation proceedings as evidenced by its brief (p. 19) wherein it is stated:

"Rather the provision of paragraph 2 of Section 3 that allotted lands may be condemned 'for any public purpose' should be taken as qualified, as regards condemnation for highways, by the more specific provision of Section 4 that Indian lands can be condemned for highways only with the permission of the Secretary."

It is apparent that this strained, unreal, unnatural and forced interpretation of the Act as advanced by the Government is not in any sense whatsoever the interpretation heretofore placed on the several sections of the Act by the United States through its Department of Interior. We again refer the Court to the Department's regulations concerning rights of way over Indian lands, Section 69, which provides:

"Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the Act of March 3, 1901, above cited."

The words "is held" obviously mean the holding of the Department of Interior, its interpretation, its decision, its construction and its definite finding. It is clear that if highways were to be excepted from the all inclusive clause "any public purpose" as contained in Section 3 of the Act of

March 3, 1901 (25 U. S. C. A. 357), then certainly the Department interpreting said Act would have so stated under said Regulation 69.

Regulation 69½ adopted in the General Revision of April 7, 1938, and quoted in the Government's brief (footnote, p. 32) is very enlightening in that this regulation does not in any respect change, modify, amend or abrogate, increase or diminish in any respect said Regulation 69, above quoted.

The intent and interpretation of the Department of Interior of Section 4 is definitely and emphatically stated again in these regulations concerning rights of way over Indian lands appearing on page 8 thereof under the heading "Public Highways" Nos. 49 to 52, inclusive. These regulations do not mention or refer in any manner to condemnation. On the contrary, Section 52 particularly describes the manner and method of the assessment for damages to be paid to the Indians, such damages to be ascertained by the Department through its superintendent or other officer in charge. This is wholly a departmental function and no procedure is set up or contemplated permitting assessment of damages through court or condemnation procedure.

II.

Conveyance of Quodonce Tract, Parcel 5, is subordinate and subject to the State's condemnation proceeding.

The State did not raise this point in its brief before this Court. However, the Quodonce conveyance was definitely brought before the lower District Court, as well as the Circuit Court. The Federal District Court considered this question and made its finding No. V (R. 65) as follows:

"That on March 12, 1936, Paul Quodonce executed a certain deed purporting to convey to the United States, in trust for the Grand Portage Band of Chippewa Indians, all of his right, title and interest in and to Parcel 5 above described; that the said conveyance was made subsequent to the filing of a Notice of Lis Pendens in

the above entitled matter by the State of Minnesota and with notice of the pendency of this action, and that the said conveyance is void insofar as it affects the right of the State of Minnesota to proceed in this action, and the estate vested in the United States of America by the said conveyance is subject to the easement herein acquired by the State of Minnesota;”

The Circuit Court made no finding as to the Quodonce transfer, presumably on the theory that the Government's claim was without merit. The Federal Government has raised this issue in its answering brief and we now submit to the Court the State's argument as to such transfer. The State does not question the validity of such transfer but does claim that the transfer is expressly subject and subordinate to the State's condemnation proceeding wherein the State is seeking to acquire an easement for highway purposes over a portion of the Quodonce Tract.

The Government concedes in its brief (p. 40) that on February 20, 1936, when it accepted the Quodonce option that it had notice of the State's condemnation proceeding which was filed February 6, 1936. The State's notice of Lis Pendens was recorded on February 8, 1936, at Grand Marais at 9:00 o'clock A. M., Book 7, Miscellaneous 129 (R. 38). The deed from Quodonce to the tribe was dated March 2, 1936 (R. 53), about a month subsequent to the filing of the State's condemnation and over two years subsequent to the Commissioner of Highways center line and width orders locating trunk highway No. 61 over and across the allotted lands.

The Government now contends that it is not bound by the State's proceeding and that it can entirely ignore and set aside the rights and equity of the State. Does the United States stand in any better or different position than the State or a private individual would so far as the effects of the notice of Lis Pendens, the commencement of the condemnation proceeding and the filing of the center line and width orders? We think not. It is held in *Ward v. Con-*

gress Construction Co., 99 Fed. 598, 39 C. C. A. 669, that where the United States acquires property from a party to a pending suit, its rights in such property are subject to the result of the litigation the same as would be those of an individual. A sale of the premises during the pendency of the State's proceeding naturally and logically therefore would be subject to the equities of the State as may be determined by this court. If the Government's position is correct and that litigation in an action in rem, and notices of Lis Pendens filed in connection therewith, mean nothing to the United States, then obviously it at any time during the course of any condemnation proceeding, regardless of its nature, could effectively nullify and block such proceeding by a purchase of the lands affected.

III.

The Indian Reorganization Act does not repeal by implication or otherwise the second paragraph of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 357).

The Government maintains that the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, (25 U. S. C. A. 461 et seq.), repeals Section 357. Such argument is wholly untenable as there is and has been no repeal, express or otherwise, whatsoever of said Section 357. On the other hand, as aptly stated in the brief *amicus curiae* (p. 5) that so far as Indian allotments are concerned, the Reorganization Act merely extends the periods of trust on such lands until otherwise directed by Congress. See Section 2 of the Act (25 U. S. C. A. 462). In so far as allotted Indian lands are concerned the Reorganization Act does in no manner affect same except to the extent above stated, i. e., the indefinite extension of trust patents, which necessarily would mean and definitely imply that all existing laws regarding lands allotted to Indians remain in full force and effect.

The Government's theory of repeal by implication of Section 357 supra, by the Reorganization Act was advanced

and argued both before the Federal District Court and the Circuit Court of Appeals. Neither court makes any finding as to the Reorganization Act and by inference we may reasonably assume that the courts did not consider said Act an issue in this case. The legal principle that repeal by implication is not favored is so well known, and cases to that effect so numerous, that the State deems it unnecessary to make any citations whatsoever.

IV.

The Treaty of September 30, 1854, authorized State condemnation and is not repealed by subsequent acts of Congress.

The Government likewise claims a repeal by implication of the last sentence of Article 3 of the Treaty. No authority is cited as to this contention. The provision of the treaty which permits all necessary rights of way for highways and railroads through any of the reserved tracts provided compensation is made as in other cases is greatly similar to like provisions found in other Indian treaties. An examination has been made of many such treaties and we find almost invariably a provision for the opening and establishment of roads, railroads and rights of way for other public purposes. Some grant the rights of way along section lines and others grant free rights of way. Unquestionably rights of way for many purposes have been acquired under such treaty terms, and if the treaty is repealed by implication the result would be to nullify established and vested rights. The Government claims that this basic covenant dealt with rights only as between the Chippewas and the United States and did not grant to the states or to private individuals rights as against both. This argument is without merit as it is common knowledge that the Government has not built any railroads, nor does it usually open and establish public highways. This clause of the treaty should be interpreted in its ordinary sense and would therefore constitute

a standing invitation to the establishment of all necessary roads, highways and railroads over the tracts by purchase or condemnation. The Government further contends in its brief that compensation as defined by the treaty means that where lands are taken away for that purpose the Indian receives compensation in the form of other lands. Article 3 concerning the exchange of lands definitely limits such exchange to mineral lands. It is contended that the phrase "compensation being made therefor as in other cases" is plain and clear, and means that the Indians be compensated either through the medium of purchase or through condemnation proceedings, and cannot be construed as being limited solely to the exchange of lands. The Government claims the repeal of this treaty provision by implication by the Act of March 3, 1901, as well as the Reorganization Act. As heretofore discussed none of these acts expressly repeals, nor can they be construed to repeal by implication this clause of the treaty.

V.

Other condemnations by the State of Minnesota over allotted Indian lands.

The State's brief (p. 22) calls attention to other condemnations of allotted Indian lands for highway purposes within the past ten years. Particular reference is made to the statement that in these other cases the Department of Interior fully cooperated with the State. The writer is informed by the Minnesota Highway Department that such other condemnation proceedings were filed in the regular manner in state courts and that no written consent was requested or received by the Indian agency or the Department of Interior. In other words, such condemnations were instituted and completed without such consent. However, the Department of Interior did cooperate in that at the time the commissioners appointed by the court viewed the premises for appraisal purposes that usually a representative

of both the state and the superintendent of the Indian agency accompanied the commissioners. This was done so that the Indian agent or representative could give full information to the commissioners as to damages, which was apparently successful as we know of no cases in which any appeals were taken from the awards of damages. This likewise permitted the condemnation proceedings to be carried on to an early conclusion. After the filing of the Commissioners' report as to damages, vouchers were obtained from the state treasurer and same were transferred to the local Indian superintendent, for payment to the allottees, at which time an application was likewise made to the superintendent of the Indian agency for the right of way across the lands, in order to fully cooperate with the Indian agency and the Department of Interior, and "double barrel" the taking of the lands. This, however, was not done until after the condemnation proceedings were completed. Such procedure subsequent to condemnation proceedings to fortify the title of the condemnor is common practice in Minnesota. As to the effect of this practice, the Minnesota Supreme Court in *Dow-Arneson Co. v. City of St. Paul*, 191 Minn. 28, 253 N. W. 6, said:

"The fact that the city took a deed when its condemnation proceedings had culminated did not change the fact that title passed to it under the condemnation. It might fortify itself with the deed without in any way forfeiting what had been acquired by the proceedings, the legality of which is not seriously questioned."

The writer is informed that in earlier condemnation proceedings for highway purposes no distinction was made between Indian lands and other fee owned lands on the project involved. In other words, where a condemnation was started and there were both Indian and privately owned lands involved, such Indian lands were included in the same proceeding. In later proceedings had affecting Indian lands such lands were acquired in a separate condem-

nation. While the Federal Government's consent was not either secured or granted as to any of these condemnations, neither has there been any objection by the Federal authorities as to any of the condemnations filed on Indian lands. In fact usually a representative of the Indian Bureau attended the court proceedings.

To summarize, therefore, both the State and the Department of Interior fully cooperated in the other proceedings. The State started its proceedings without consent but did naturally serve the Indian agent and the individual Indians, who were duly represented in all respects by the Department of Interior and its agents. At the time of oral argument, this Court requested the Federal Government to furnish information as to the other condemnation proceedings brought and successfully concluded by the State of Minnesota as stated in the State's brief (p. 22). The foregoing is submitted for the Court's further information, particularly with respect to the nature and manner of procedure, as well as to evidence the State's full cooperation with the Department of Interior concerning the acquirement by condemnation of such allotted lands for a public purpose.

C.

CONCLUSION.

WHEREFORE, the State prays that the Circuit Court be in all things reversed and the Federal District Court be in all things affirmed.

Respectfully submitted,

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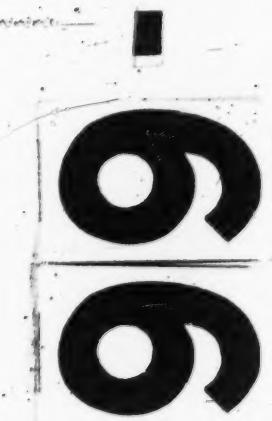
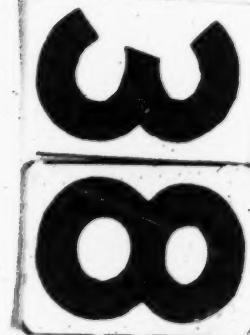
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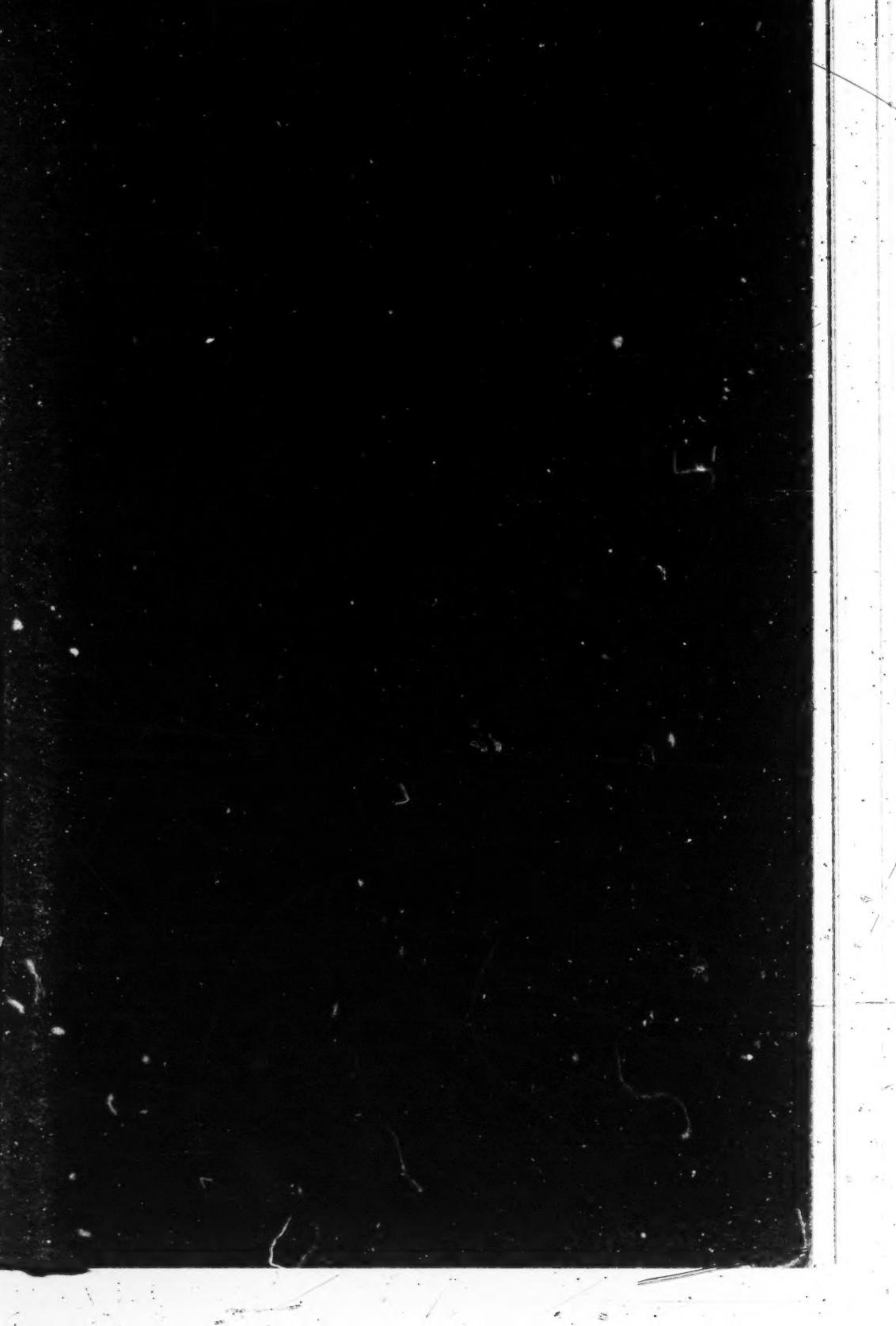


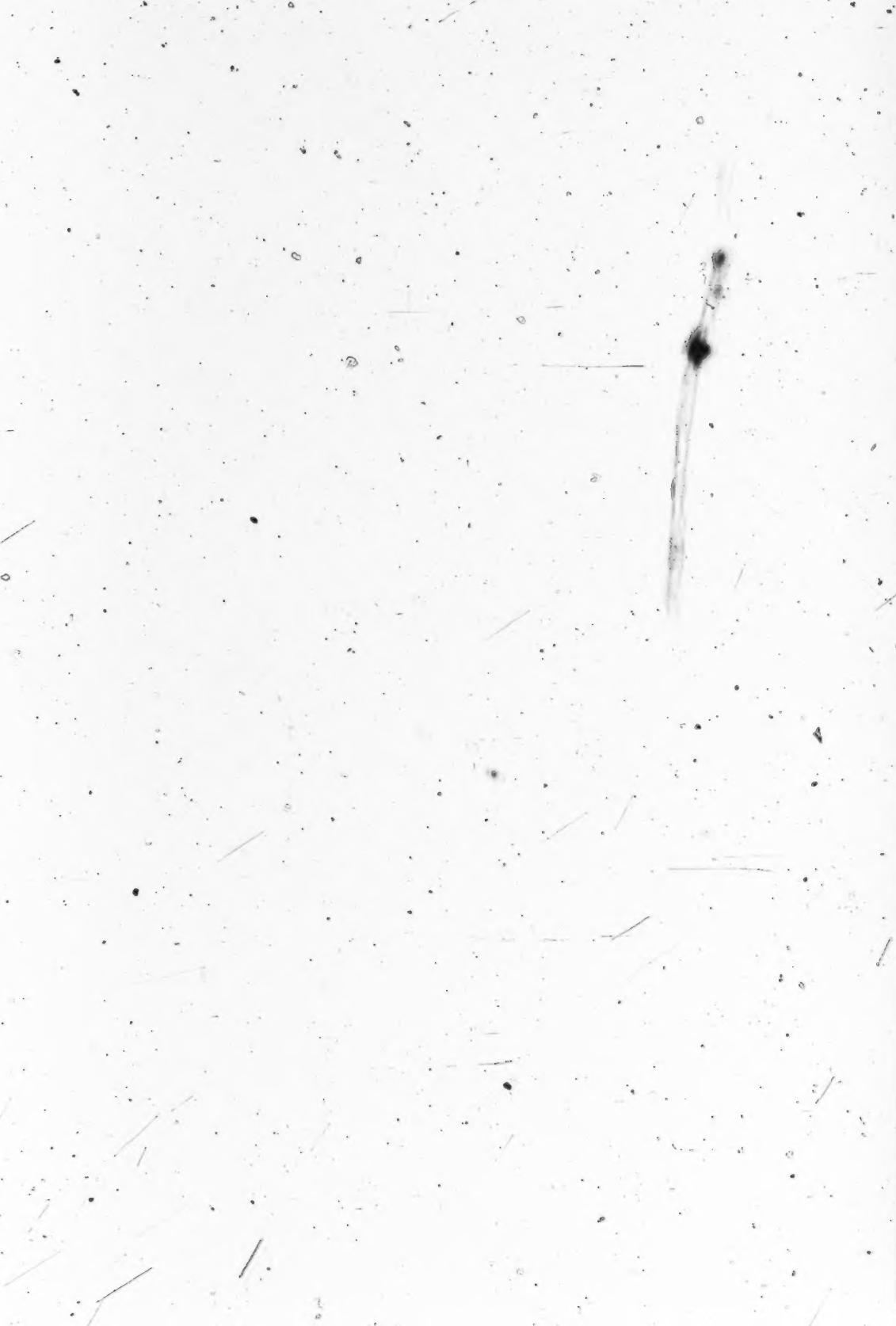
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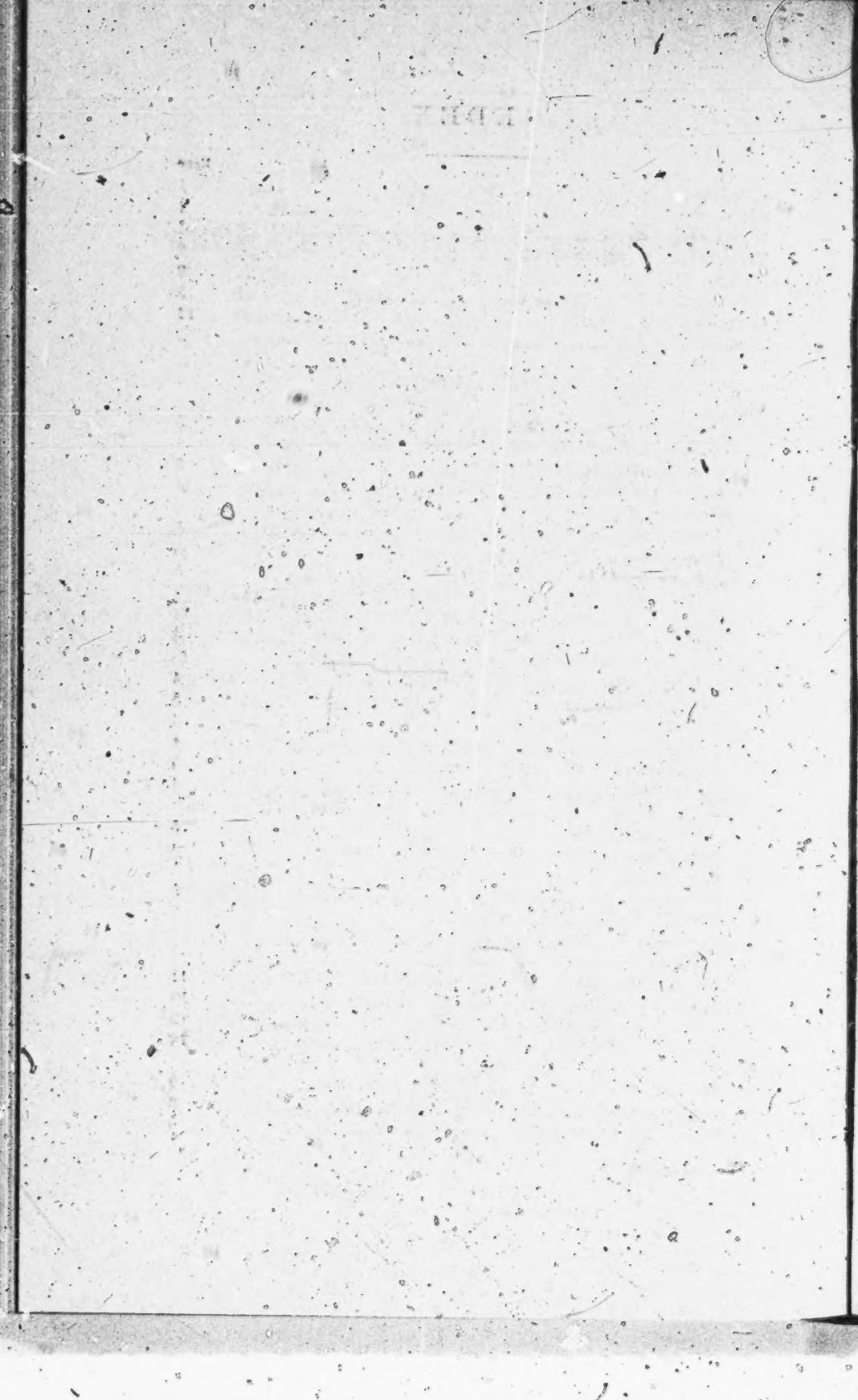


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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. Its judgment appears at R. 58-68. The opinion of the Circuit Court of Appeals (R. 84) is reported at 95 F. (2d) 468.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1938 (R. 92). Petition for certiorari was filed on May 31, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

(1)

QUESTIONS PRESENTED

1. Whether a State has power to condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees.
2. Whether the United States has consented to the condemnation, by a State, for a highway, of lands which the United States holds in trust for Indian allottees.

TREATY AND STATUTES INVOLVED

The treaty and statutes primarily involved are: Treaty of September 30, 1854 (10 Stat. 1109); Act of March 3, 1901 (31 Stat. 1058); Act of June 18, 1934 (48 Stat. 984). Relevant portions are set forth in the Appendix.

STATEMENT

The State of Minnesota filed a petition February 6, 1936, in a Minnesota district court for the condemnation of certain lands for highway purposes (R. 2). It appeared on the face of the petition that these lands were held in fee simple by the United States in trust for Indian allottees (R. 4-11). The United States removed the case to the Federal district court (R. 23-26). On the hearing of the case the State presented its petition and certain exhibits (R. 41-48) and moved for the allowance of its petition and for the appointment of appraisers (R. 48). There was no showing that the State had obtained the permission of the Secre-

tary of the Interior to build the highway across the Indian allotments. The United States appeared specially and moved that the action be dismissed because it was against the United States and the United States had not consented to it (R. 48).

The District Court denied the motion of the United States (R. 58) and granted the petition of the State (R. 59). On appeal by the United States the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the District Court with directions to dismiss (R. 92). It held that the State could not maintain this suit without the consent of the United States, and that the United States had not consented (R. 87-91).

ARGUMENT

1. The petitioner's contention that a State has power to condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees, presents a question already settled by this Court contrary to the petitioner's contention. The petitioner does not challenge the power of the United States to hold lands in trust for Indian allottees, or assert that lands so held are subject to state power to a greater extent than are other lands held by the United States, but argues generally that lands held by the United States "should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose."

where such added use would not be inconsistent with or defeat the first purpose." (Br. p. 40.)

The initial difficulty with this contention is the principle which bars any suit by a State to condemn property of the United States. A State cannot sue the United States. *Kansas v. United States*, 204 U. S. 331, 343; *Arizona v. California*, 298 U. S. 558, 568. And it is well settled that a suit against property of the United States is a suit against the United States, and so cannot be maintained. *The Siren*, 7 Wall. 152, 154; *Carr v. United States*, 98 U. S. 433, 437-439; *Stanley v. Schualby*, 147 U. S. 508, 512. Accordingly, in *United States v. Calvard*, 89 F. (2d) 312 (C. C. A. 4th) a decree condemning allotted Indian lands for purposes of a highway, where the permission of the Secretary of the Interior had not first been obtained, was held to give no title.

Apart from the problem of jurisdiction, petitioner's contention fails to take proper account of the principle, embodied in Article VI, clause 2, of the Constitution, and in such decisions of this Court as *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211; *Sanitary District v. United States*, 266 U. S. 405, 425-426; and *United States v. California*, 297 U. S. 175, 183-184, that any exercise of state power, of whatever sort, must yield to a constitutional exercise of Federal power. It is answered specifically by the provision of the Constitution (Article IV, Section 3, clause 2) that Congress shall have power to dispose of and make all needful rules and regu-

lations respecting the property of the United States, and by the pronouncements of this Court that no State can affect the title of the United States or interfere with the disposal of its property. See *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404-405; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *Irvine v. Marshall*, 20 How. 558, 563; *Gibson v. Chouteau*, 13 Wall. 92, 99; *Wilcox v. McConnel*, 13 Pet. 498, 517. Compare *Arizona v. California*, 283 U. S. 423, 464; *Bunch v. Cole*, 263 U. S. 250, 252. No purpose would be served by reaffirming what is already as clear as the explicit words of the Constitution and repeated decisions of this Court can make it.

Pefitioner relies on *United States v. Chicago*, 7 How. 185; *United States v. Railroad Bridge Co.*, 6 McLean 517, Fed. Cas. No. 16,114 (C. C. N. D. Ill.); and *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 26 Fed. 477 (C. C. N. D. Ill.). The case first cited reserves the question, the second holds, and the third states in dictum that a State can condemn public lands of the United States which have not been set aside for a specific Federal purpose. This Court expressed a considerable doubt as to the correctness of that doctrine in *Van Brocklin v. Tennessee*, 117 U. S. 151, 161-162. In *Utah Power & Light Co. v. United States*, *supra*, these decisions were advanced as supporting the power of the State to condemn lands of the United States

(243 U. S. 389 at 393), but this Court replied (p. 404):

* * * the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

However this may be, the lands sought to be condemned in this case have been reserved for a specific Federal purpose, and therefore could not be condemned even under the doctrine of the cases cited by petitioner.

2. Thus, petitioner can succeed only if it shows that the United States has consented to the condemnation action. The court below held that the United States has not consented. This decision presents no question of general importance and is not in conflict with that of any other Federal court.

a. As consenting to such condemnation the petitioner relies mainly upon paragraph 2 of Section 3 of the Act of March 3, 1901, *infra*, p. 13. That paragraph provides that lands allotted in severalty to Indians may be condemned in the same manner as land owned in fee, and that the money awarded shall be paid to the allottee. Paragraph 1 of Section 3 authorizes the Secretary of the Interior to grant rights of way for telegraph and telephone lines and offices through Indian reservations and

allotted Indian lands restricted as to alienation, provides that such lines shall not be constructed without the authority of the Secretary, and provides that the compensation to be paid to the Indians shall be determined as the Secretary may direct and shall be subject to his final approval. Section 4 of the Act authorizes the Secretary to grant permission, upon compliance with such requirements as he may deem necessary, for the opening of public highways through Indian reservations and allotted Indian lands restricted as to alienation.

The Circuit Court of Appeals held that paragraph 2 of Section 3, read in its context, merely prescribes the procedure to be followed in a suit for the condemnation of Indian lands after authority for the condemnation has been obtained from the Secretary of the Interior. This holding, it is submitted, is correct. Paragraph 2 of Section 3 is placed between paragraph 1 of Section 3 and Section 4, both dealing in detail with the acquisition, under authority of the Secretary, of rights of way for specific purposes (including highways) across Indian lands. It seems plain that paragraph 2, at least as respects the purposes specifically dealt with in Sections 3 and 4, does no more than to prescribe the procedure to be followed in a condemnation suit, if permission for such acquisition of land is granted by the Secretary, and to remove the bar to such procedure which would otherwise be found

in the fact that suit must be brought against the United States.¹

Petitioner would construe the second paragraph of Section 3 to authorize condemnation of land for highway purposes without the permission of the Secretary, even though Section 4 in terms requires the permission of the Secretary "for the opening and establishment of public highways * * *." This construction makes the statute self-contradictory. Indeed, petitioner views Section 4 as largely inoperative, since it states (Br. 21) that the Secretary's permission, although required under Section 4, is unnecessary "if agreement be impossible" because of the supposed power to condemn irrespective of the Secretary's authority.

Petitioner also emphasizes that paragraph 2 of Section 3 was added to the Act as an amendment to the original bill, but that, of course, does not mean that it is not to be read with the rest of the Act. Compare *James v. Dravo Contracting Co.*, 302 U. S. 134, 145.

Shell Petroleum Co. v. Town of Fairfax, 180 Okla. 326, 69 Pac. (2d) 649, strongly emphasized by the petitioner, interprets paragraph 2 as consenting to the condemnation of Indian allotments, but overlooks the interrelation of that paragraph with the other provisions of the Act. Although opposed

¹ Paragraph 2 was introduced on the floor of the Senate and has no explanatory legislative history. Petitioner quotes (Br. 19-20) the full discussion which led to its adoption.

to the decision below, the authority to remove into a Federal court is sufficient guaranty against any application in Oklahoma of a state doctrine contrary to the rule in the Federal courts.

Furthermore, the Act of 1901 was in this respect superseded by the Act of June 18, 1934, known as the Wheeler-Howard Act, *infra* p. 14. That Act terminated any immediate attempt of the United States to assimilate the Indians, and initiated a policy of encouraging their tribal life and independent development. Section 4 of the Act provides that except as therein provided no transfer of restricted Indian lands shall be made, except that with the approval of the Secretary of the Interior allotted lands may be transferred to the Indian tribe, and except that such lands shall descend or be devised in accordance with existing laws to any member of the tribe or any heirs of such member. Paragraph 2 of Section 3 of the Act provides that nothing therein shall restrict the granting or use of permits for easements or rights of way over the lands.² This Act impliedly repeals any consent in the Act of 1901 to condemnation by the States of allotted Indian lands: (1) The general purpose of the Act excludes any severance of the Indian holdings. (2) The literal meaning of Section 4 forbids

² The committee reports (S. Rept. 1080, H. Rept. 2049, 73d Cong., 2d Sess.) and the debates (78 Cong. Rec. 10583, 11122-11139, 11724-11744) throw no light on the interpretation of this provision.

all transfers of restricted lands. (3) Finally, the specific exceptions in Sections 3 and 4, to the prohibition of Section 4 against transfer of Indian lands, forbid any construction by which other exceptions would be permitted.

b. The petitioner contends also that the United States has consented to the condemnation of the lands sought in this case by the treaty between the United States and the Chippewa Indians of September 30, 1854, *infra*, p. 12. Article 3 of that treaty provides in part that:

All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

There are many reasons why this provision has no relevance to the present case: (1) The treaty provision related only to tribal lands, and did not authorize roads to be run through allotted lands; the machinery for allotment was first set up by the Act of January 14, 1889, c. 24, 25 Stat. 642. (2) If the treaty provision had application to allotted lands, it clearly was repealed by the Act of 1901, discussed above. Whatever interpretation be given that Act, it fully covers any acquisition of Indian lands for highways. (3) If the treaty provision had not theretofore been repealed by implication, it was repealed by the Wheeler-Howard Act, discussed above. (4) The treaty dealt with rights only as between the Chippewas and the United

States; it did not grant to the States or to private interests rights as against both.

CONCLUSION

The decision of the Court of Appeals presents no substantial question of general importance, is not in conflict with any other Federal decision, and is correct. Therefore, it is respectfully submitted that the petition should be denied.

✓ ROBERT H. JACKSON,

Solicitor General.

✓ CARL MCFARLAND,

Assistant Attorney General.

✓ C. W. LEAPHART,

THOMAS E. HARRIS,

Attorneys.

JULY 1938.

APPENDIX

Treaty of September 30, 1854, between the United States and the Chippewa Indians (10 Stat. 1109)—

ARTICLE 3. * * * [the President] may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083—

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of

the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission,

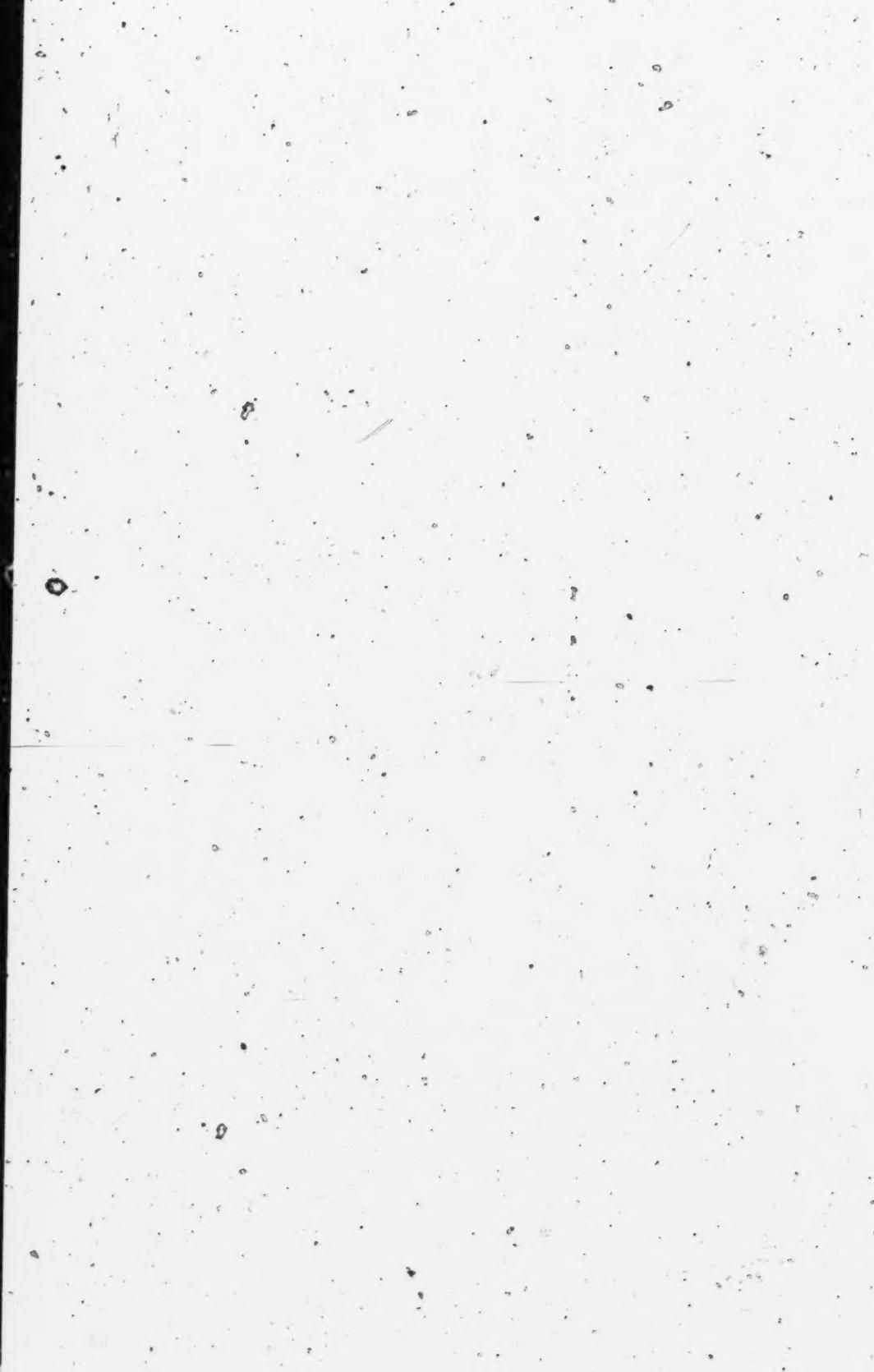
upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of June 18, 1934 (Wheeler-Howard Act),
c. 576, 48 Stat. 984—

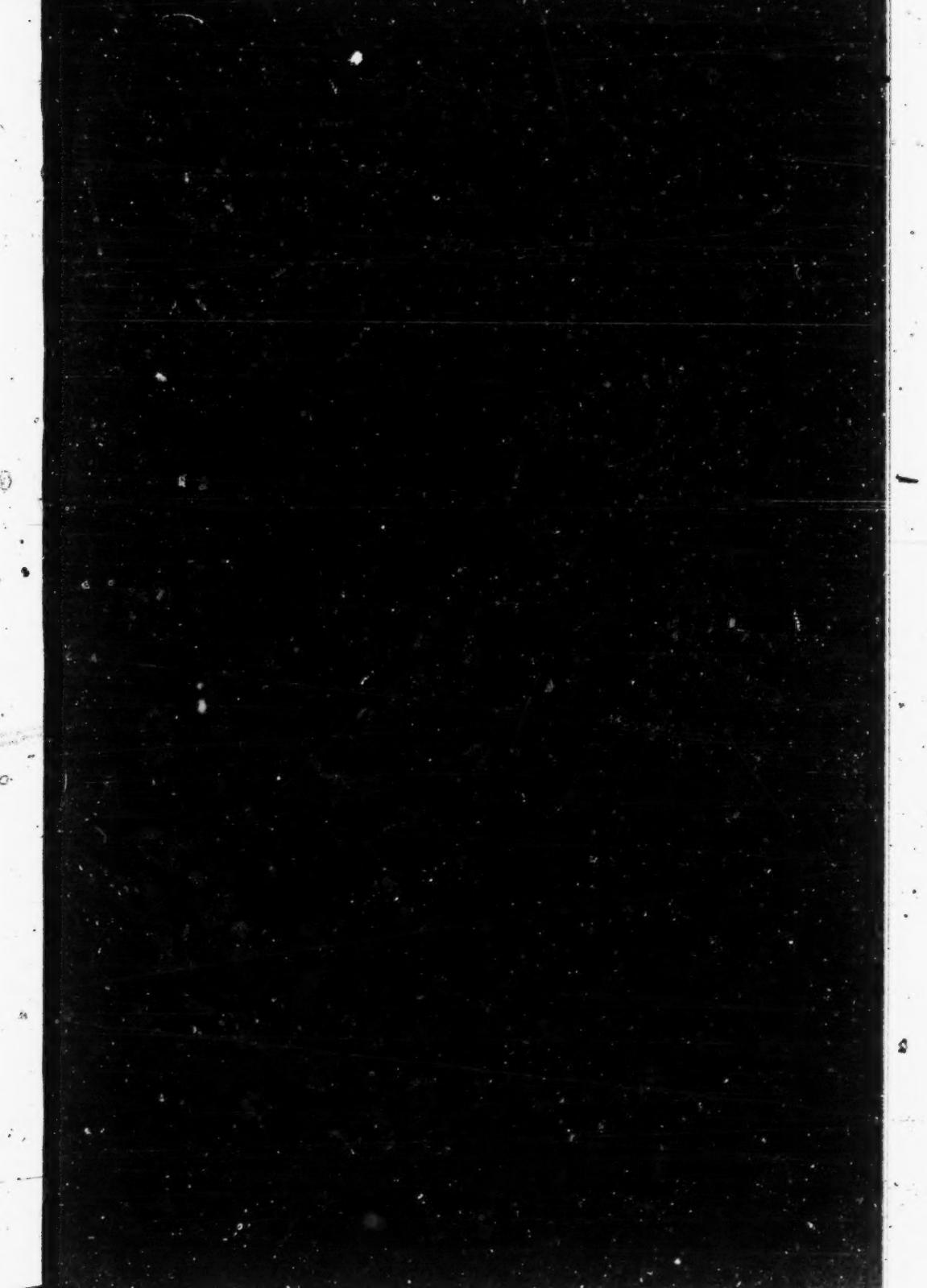
SEC. 3.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes;

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member:







9

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED
STATES

The reply brief filed on behalf of the State of Minnesota correctly points out (p. 2) that *United States v. Colvard*, 89 F. (2d) 312, (C. C. A. 4th), was erroneously summarized in the brief for the United States in opposition (p. 4). The land concerned there was, as the Attorney General of Minnesota points out, tribal rather than allotted lands. This in no way affects the argument of the brief in opposition, to the effect that without its consent no suit can be brought to condemn lands held in trust by the United States. But we wish to ex-

(1)

press both our regret for this inadvertence and our full concurrence with the suggestion of the Attorney General of the State that we have erroneously summarized this case.

Respectfully submitted,

ROBERT H. JACKSON,

Solicitor General.

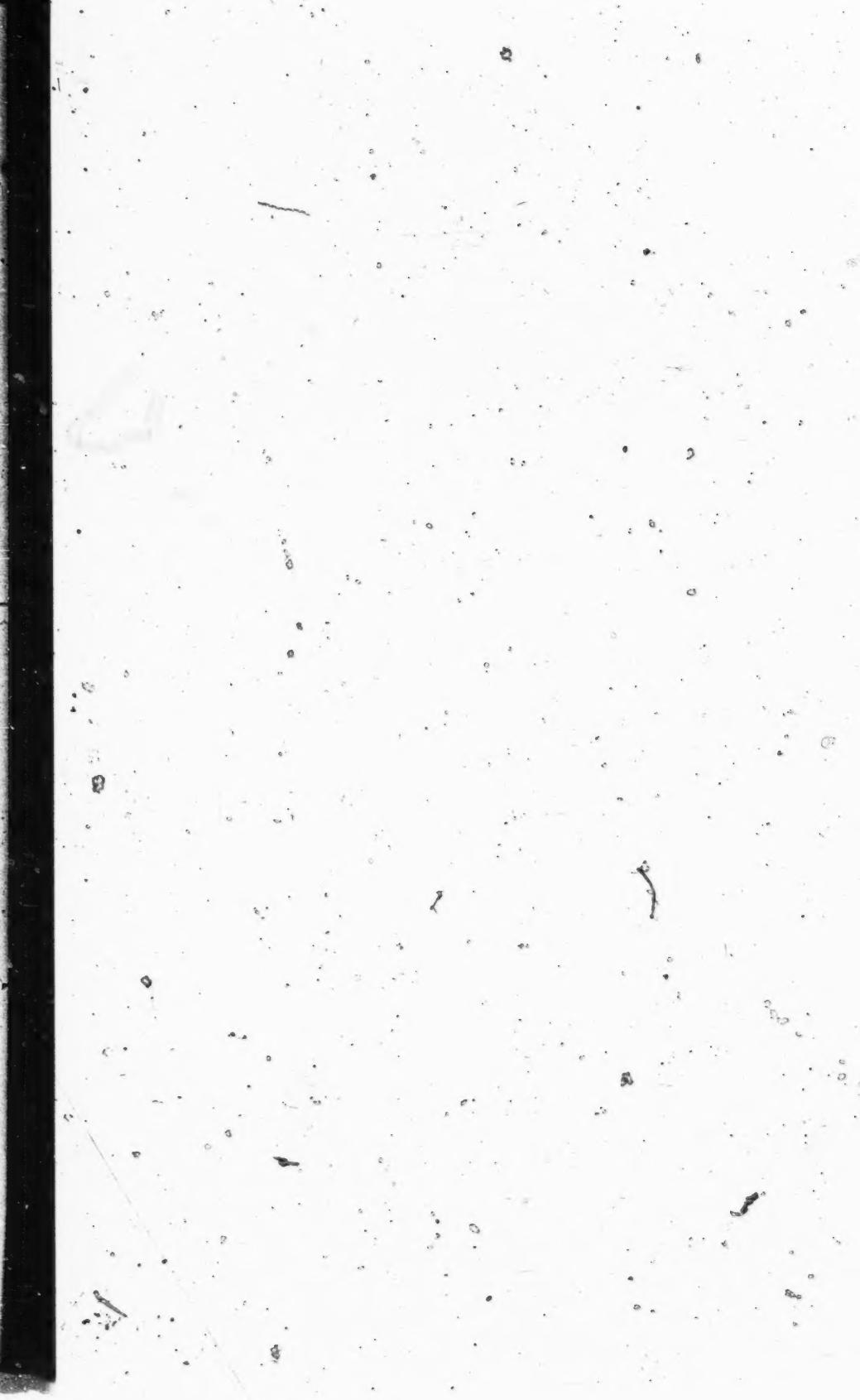
CARL McEARLAND,

Assistant Attorney General.

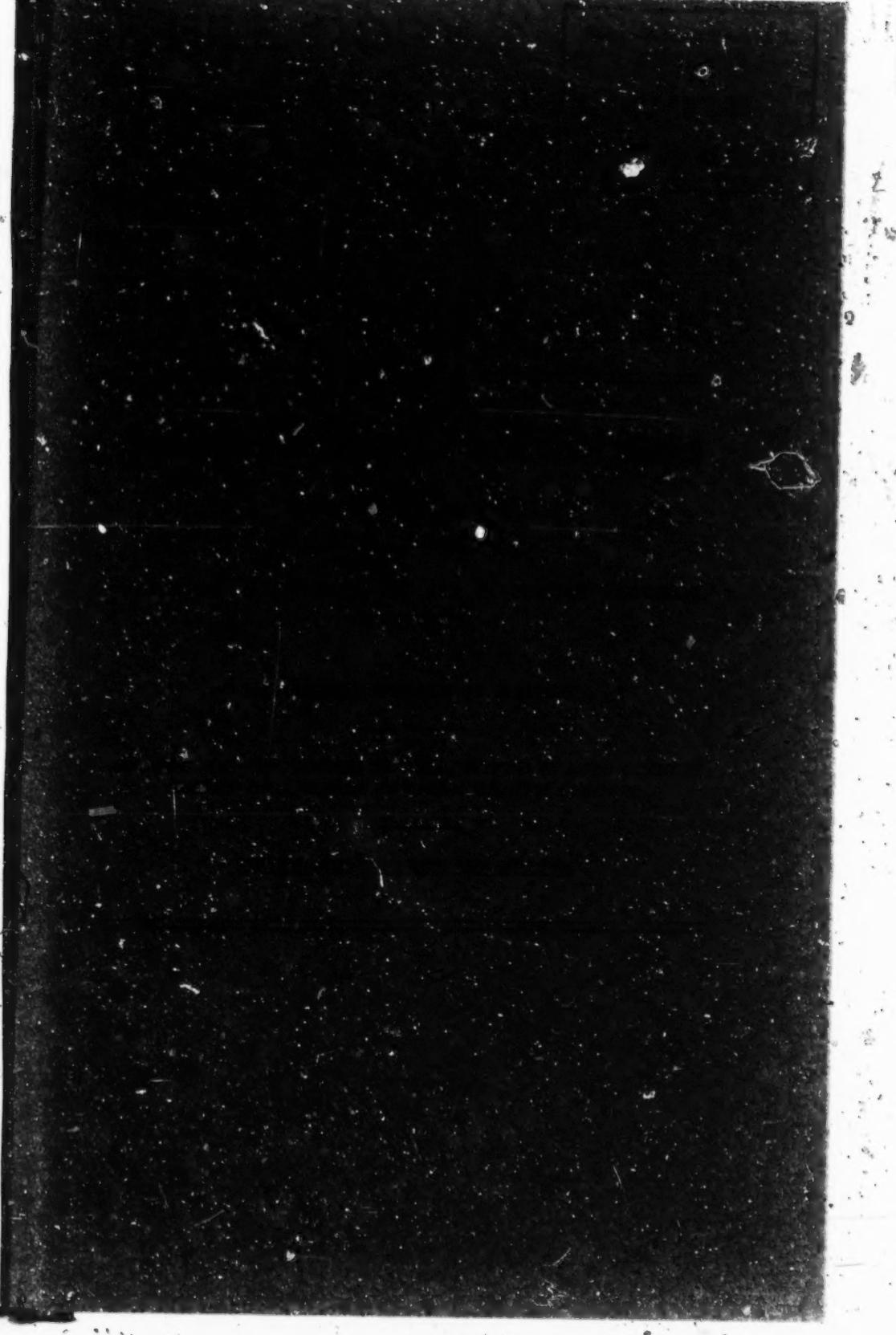
WARNER W. GARDNER,

Special Attorney.

OCTOBER, 1938.









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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. Its order appears at R. 55-66. The opinion of the Circuit Court of Appeals (R. 81) is reported at 95 F. (2d) 468.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1938 (R. 89). Petition for certiorari was filed on May 31, 1938, and was granted October 10, 1938. The jurisdiction of this Court rests on Section 240

(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a State can condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees or for an Indian tribe.
2. Whether the Act of March 3, 1901 (31 Stat. 1058, 1084), consents to the condemnation of Indian allotments, for highway purposes, without the permission of the Secretary of the Interior; paragraph 2 of Section 3 of that Act providing that allotted Indian lands may be condemned for any public purpose under the laws of the State, and Section 4 thereof providing that the Secretary of the Interior may grant permission to state authorities for the opening of highways in accordance with the laws of the State through tribal and allotted Indian lands.
3. Whether the Act of March 3, 1901, consents that a proceeding to condemn Indian allotments may be brought in a state court, although it does not specifically eliminate the necessity of joining the United States in such a proceeding or consent that it be sued in a state court.
4. Whether the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, was repealed by the Indian Reorganization Act (48 Stat. 984), Section 4 of which prohibits any transfer of Indian lands except as provided in that Act,

and Section 3 of which provides that nothing therein contained shall restrict the granting of permits for rights of way.

5. Whether the petitioner is authorized to take the lands here sought by a provision of the Treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians that all necessary roads shall have the right of way through the tracts reserved by the treaty to the Indians; and whether that provision has been superseded (1) by the Act of January 14, 1889 (25 Stat. 642), which provided for the cession to the United States of the reservation in which the lands here involved were located, reserving to individual Indians who so chose the right to take allotments on the ceded reservation, (2) by the Act of March 3, 1901, or (3) by the Indian Reorganization Act.

6. Whether the United States had power, by purchasing an Indian allotment in trust for an Indian tribe, to revoke any consent it had given to the condemnation of the allotment, after the petitioner had initiated condemnation proceedings and had filed a notice of *lis pendens*, but before title had passed.

TREATY AND STATUTES INVOLVED

There is set forth in the Appendix the treaty and statutes primarily involved: Treaty of September 30, 1854 (10 Stat. 1109); Act of March 3, 1901 (31 Stat. 1058); Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984).

STATEMENT

The State of Minnesota filed a petition February 6, 1936, in a Minnesota district court for the condemnation of nine described tracts of land for highway purposes (R. 1). The petition recited that the United States held the fee of each tract in trust, and that various named individuals were the owners under Indian allotments (R. 3-11). The United States of America was named as a party defendant (R. 1), and notice was served upon the United States Attorney R. 21-22).

The United States removed the case to the Federal district court (R. 24-25).

On the hearing of the case the State presented its petition in condemnation (R. 38); called the court's attention to the fact that notice of *lis pendens* had been recorded on February 8, 1936 (R. 38); and introduced in evidence copies of three orders of the Minnesota commissioner of highways locating the right of way of the highway for which the lands are sought (R. 38-45). The State then rested and moved for the allowance of the petition and for the appointment of appraisers (R. 45). There was no showing that the State had obtained the permission of the Secretary of the Interior to build the highway across the Indian allotments or to institute this condemnation proceeding.

The United States appeared specially and moved that the action be dismissed because it was against the United States and the United States had not

consented to it (R. 45-46). The United States made a second motion that the action be dismissed with particular reference to Parcel 5 on the same grounds (R. 46). The petition had stated that Paul Quodonce was the owner of Parcel No. 5 under an Indian allotment, and that the United States was the holder of the fee in trust (R. 3). In support of the motion to dismiss as to Parcel 5, the United States introduced in evidence a copy of an option, given by Quodonce on January 22, 1936, and accepted by the United States on February 20, 1936, for the purchase of certain land by the United States from Quodonce (R. 46-52), and a copy of a deed, dated March 2, 1936, for the land from Quodonce to the United States in trust for the Grand Portage Band of Chippewa Indians (R. 53-55). The option recites that it is given "to assist in the program of the United States to acquire lands under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), for Indian purposes * * *" (R. 47). Comparison of the option (R. 47) and deed (R. 53) with the petition (R. 3) shows that the land conveyed included all of the tract described in the petition as Parcel 5.

The District Court found that the United States had consented that this proceeding be brought against the allottees by paragraph 2 of Section 3 of the Act of March 3, 1901, 31 Stat. 1058, 1084, and that the United States was, accordingly, not a necessary party (R. 57); and that the conveyance of

Parcel 5 by Quodonce to the United States in trust for the Grand Portage Band of Chippewa Indians was made subsequent to the filing of a notice of *pendens* by the State, and did not affect the right of the State to proceed in this action (R. 65). The motions of the United States were therefore denied (R. 56).

On appeal by the United States, the Circuit Court of Appeals for the Eighth Circuit reversed, with directions to dismiss (R. 88). It held that the State could not maintain this suit against the United States without the consent of the United States, and that since the Secretary of the Interior had not first given his permission for this proceeding, the United States had not consented by the Act of March 3, 1901 (R. 81-88).

SUMMARY OF ARGUMENT

A State cannot, without the consent of the United States, condemn lands which the United States holds in trust for Indian allottees or for an Indian tribe. In the first place, even a State cannot sue the United States without the consent of the latter, *Kansas v. United States*, 204 U. S. 331, 342-343, and a suit against property of the United States is a suit against the United States, and so cannot be maintained without its consent. *Carr v. United States*, 98 U. S. 433, 437-439; *Stanley v. Schwalby*, 147 U. S. 508, 512. In the second place, no State has the substantive power to acquire property of the United States without the latter's consent.

Utah Power & Light Co. v. United States, 243 U. S. 389, 404-405; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650.

The United States has not authorized the condemnation of Indian allotments for highway purposes without the permission of the Secretary of the Interior. The provision in paragraph 2 of Section 3 of the Act of March 3, 1901 (31 Stat. 1058), largely relied upon by the petitioner (Br. 11-32), that Indian allotments "may be condemned for any public purpose under the laws of the State," must be viewed as qualified, as regards condemnation for highways, by the provision of Section 4 of that Act authorizing the Secretary of the Interior to grant permission to state authorities "for the opening * * * of public highways, in accordance with the laws of the State * * *." The latter provision plainly covers the opening of highways by condemnation and permits such opening only with the permission of the Secretary: if paragraph 2 of Section 3 were interpreted as dispensing with that consent the statute would be self-contradictory.

Even if the Act of March 3, 1901, consented unconditionally to the condemnation of Indian allotments, the condemnation proceeding could be brought only in Federal court. The United States is an indispensable party to the proceeding unless the Act of March 3, 1901, provides otherwise. *Bowling v. United States*, 233 U. S. 528, 534-535.

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That Act does not expressly eliminate the necessity that the United States be made a party, and such a provision cannot be implied, since it would violate the duty owed by the United States to its Indian wards to protect and represent their interests—a duty which has been consistently recognized by this Court and by Congress. See *Heckman v. United States*, 224 U. S. 413, 444; *McKay v. Kuykendall*, 204 U. S. 458, 469. Since the United States must be made a party to a suit under the Act of March 3, 1901, for the condemnation of Indian allotments, the suit can be brought only in Federal court. The Act does not provide in what forum suit is to be brought, and statutes consenting to suit against the United States are strictly construed, *Eastern Transportation Co. v. United States*, 272 U. S. 675, 686, and should not, in the absence of express language, be interpreted as consenting to suit in state courts. Compare *Stanley v. Schwalby*, 162 U. S. 255, 270.

In any event, the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, was repealed by the Indian Reorganization Act (48 Stat. 984). Section 4 of that Act provides: "Except as herein provided, no * * * transfer of restricted Indian lands * * * shall be made or approved: * * *." Any doubt that this section repeals the condemnation provisions of the Act of March 3, 1901, is resolved by the proviso in Section 3 of the Indian Reorganization Act that "Nothing

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herein contained shall restrict the granting or use
of permits for easements or rights-of-way." This
explicit preservation of one method by which rights
of way across Indian lands may be acquired
plainly indicates that no other method was meant
to survive.

The petitioner also cites (Br. 33-36), as authorizing this proceeding, a provision in the Treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians, to the effect that necessary roads shall have the right of way through the tracts reserved to the Indians. There are several reasons why this provision has no application here: (1) The treaty dealt only with rights between the Indians and the United States; it did not grant to the petitioner or to private interests rights against both. (2) The treaty was superseded, as regards the Grand Portage Reservation (in which the lands here involved are situated) by the Act of January 14, 1889 (25 Stat. 642), which provided for the cession of that reservation to the United States, individual Indians to have the right to choose allotments there. (3) If the treaty provision ever had any pertinence to the right of the petitioner to condemn, and if it was not repealed by the Act of January 14, 1889, it clearly was repealed by the Act of March 3, 1901, regardless of whether that Act be construed as urged by the petitioner or as urged by the Government. (4) If the treaty provision had not there-

tofore been repealed by implication, it was repealed by the Indian Reorganization Act.

Finally, whatever view may be taken as to the right of the petitioner to condemn the eight tracts of land which are held in trust for individual Indians, in no event can it condemn the remaining tract—Parcel 5—which is held in trust for an Indian tribe. It has never been suggested that the United States has consented to the condemnation of Indian tribal land. While it is true that Parcel 5 was held in trust for an individual Indian when this condemnation proceeding was filed, and was thereafter purchased by the United States in trust for the tribe, the United States had power to withdraw its consent that the allotment be condemned at any time before the State actually acquired title. *Lynch v. United States*, 292 U. S. 571, 581-582; *The Yosemite Valley Case*, 15 Wall. 77, 87.

ARGUMENT

I

A STATE HAS NO POWER, WITHOUT THE CONSENT OF THE UNITED STATES, TO CONDEMN LANDS WHICH THE UNITED STATES HOLDS IN TRUST FOR INDIAN ALLOTTEES OR FOR AN INDIAN TRIBE

The petitioner urges (Br. 36-42) that a State has power to condemn lands of the United States, regardless of the consent of the latter, for a use which is "supreme or paramount" to the use being made of the lands by the United States. The petitioner

does not challenge the power of the United States to hold lands in trust for Indian allottees or an Indian tribe,¹ or assert that lands so held are subject to state power to a greater extent than are other lands held by the United States, but argues generally that lands held by the United States "should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose" (Br. 42).

The initial fallacy in the contention of the petitioner is that a suit to condemn lands of the United States is a suit against the United States, and cannot be maintained without the consent of Congress. Even a State cannot sue the United States without the consent of the latter. *Kansas v. United States*, 204 U. S. 331, 342, 343; *Arizona v. California*, 298 U. S. 558, 568. And it is well settled that a suit against property of the United States is a suit against the United States, and so cannot be maintained without its consent. *The Siren*, 7 Wall. 152, 154; *Carr v. United States*, 98 U. S. 433, 437-439; *Stanley v. Schwalby*, 147 U. S. 508, 512; and also see pp. 518, 519, distinguishing *United States v. Lee*,

¹ That the United States has such power, see *United States v. Kagama*, 118 U. S. 375, 384-385; *United States v. Rickert*, 188 U. S. 433, 437; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17; *Worcester v. Georgia*, 6 Pet. 515, 559, 561.

106 U. S. 196. Accordingly, in *United States v. Colvard*, 89 F. (2d) 312 (C. C. A. 4th), a decree condemning Indian tribal lands for a highway, where the United States had not been made a party to the proceeding, was held to give no title. Compare, *Bowling v. United States*, 233 U. S. 528, 534-535; *Privett v. United States*, 256 U. S. 201, 204.

Apart from the problem of jurisdiction, the petitioner's contention must fail because it contravenes the principle that any exercise of state power, of whatever sort, must yield to a constitutional exercise of Federal power. This principle is embodied in Article VI, clause 2, of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It has found expression in innumerable decisions of this Court, such as *Gibbons v. Ogden*, 9 Wheat. 1, 210-211; *Sanitary District v. United States*, 266 U. S. 405, 425-426; and *United States v. California*, 297 U. S. 175, 183-184. As said by Mr. Justice Holmes in the *Sanitary District* case (pp. 425-426), "This is not a controversy between equals." The power of the United States, wherever it exists, "is superior to that of the States to provide for the welfare or necessities of their inhabitants."

The contention that a State can condemn Federal lands without the consent of the United States is specifically refuted by the provision of the Constitution (Article IV, Section 3, clause 2) that Congress shall have power to dispose of and make all needful rules and regulations respecting the property of the United States, and by the repeated pronouncements of this Court that no State can affect the title of the United States or interfere with the disposal of its property. See *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404-405; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *Irvine v. Marshall*, 20 How. 558, 563; *Gibson v. Chouteau*, 13 Wall. 92, 99; *Wilcox v. McConnel*, 13 Pet. 498, 517. Compare *Arizona v. California*, 283 U. S. 423, 464; *Bunch v. Cole*, 263 U. S. 250, 252.

As this Court said in *Utah Power & Light Co. v. United States, supra* (pp. 404-405), the jurisdiction of the State over lands within its limits—

does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. * * * From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, * * * and has provided for and controlled the acquisition of rights of way

over them for highways, railroads, canals, ditches, telegraph lines, and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. * * *

Not only is a State powerless to condemn land held by the United States, but the United States has full power to condemn for Federal purposes land which has already been devoted to a public use by a State. *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 685; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; *C. M. Patten & Co. v. United States*, 61 F. (2d) 970 (C. C. A. 9th), reversed as moot, 289 U. S. 705; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J.); *United States v. City of Tiffin*, 199 Fed. 279 (C. C. N. D. Ohio). See I Nichols, *Eminent Domain* (2d ed.), p. 113. In the *Stockton* case Mr. Justice Bradley, sitting on circuit, said (32 Fed. at p. 19):

If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it.

This statement was quoted with approval by this Court in *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 656.

Petitioner relies on *United States v. Chicago*, 7 How. 185; *United States v. Railroad Bridge Co.*, 6

McLean 517, Fed. Cas. No. 16, 114 (C. C. N. D. Ill.); and *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 26 Fed. 477 (C. C. N. D. Ill.). The case first cited reserves the question, the second holds, and the third states in dictum, in an oral opinion, that a State can condemn public lands of the United States which have not been set aside for a specific Federal purpose. This Court expressed doubt as to the correctness of that doctrine in *Van Brocklin v. Tennessee*, 117 U. S. 151, 161-162. In *Utah Power & Light Co. v. United States, supra*, these decisions were advanced as supporting the power of the State to condemn lands of the United States (243 U. S. 389, at 393), but this Court replied (p. 404):

* * * the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

In any event, the lands sought to be condemned in this case have been reserved for a specific Federal purpose—the support of Indian wards of the United States—and, therefore, could not be condemned even if the doctrine of the cases cited by petitioner were accepted.

The petitioner relies also upon 19 Lands Decisions 24 (1894), a ruling by the Secretary of the Interior that a State has power to condemn allotted

Indian lands. As authority for the position taken in the ruling, the Secretary set forth a quotation which he cited as from *West River Bridge Co. v. Dix*, 6 How. 507. The quotation is:

The right of taking property for public use is exercised by a state, subject to no power vested in the Federal government. The proprietary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a State.

No such language is to be found in the *West River Bridge Co.* case, nor has that case any relevance whatever to the question of state condemnation of Federal lands. The quotation appears, instead, to be a slightly garbled version of one of the head notes to *United States v. Railroad Bridge Co.*, discussed *supra*. As has been shown, it is wholly unsupported by modern authority and is inconsistent with fundamental principles of constitutional law.

II

THE ACT OF MARCH 3, 1901, DOES NOT AUTHORIZE THE CONDEMNATION OF INDIAN ALLOTMENTS FOR HIGHWAY PURPOSES WITHOUT THE PERMISSION OF THE SECRETARY OF THE INTERIOR

It has been shown that the State cannot maintain this proceeding without the consent of the United States. As giving such consent, the State relies primarily (Br. 11-33) upon the Act of March 3, 1901, 31 Stat. 1058. That Act was the Indian ap-

propriation Act for the fiscal year 1902. The parts of the Act pertinent to this case follow the provisions dealing with appropriation. They read (31 Stat. 1083-1084) :

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices * * * through any Indian reservation * * * or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; * * * and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. * * *

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory

where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

The petitioner urges (Br. 11-32) that paragraph 2 of Section 3, quoted above, authorizes and consents to the condemnation of allotted Indian lands for any public purpose, including highways, without the permission of the Secretary of the Interior.

The Government contends, and the Circuit Court of Appeals held (R. 86-88), that this case is controlled by Section 4. That section, it will be noted, authorizes the Secretary of the Interior to grant permission to state or local authorities "for the opening and establishment of public highways, in accordance with the laws of the State or Territory" through Indian reservations or allotted Indian lands. This provision clearly covers all acquisition of Indian lands for highways, whether by condemnation or negotiation, and requires the ac-

quiring authority to secure the permission of the Secretary for such acquisition. The words "the opening and establishment of public highways, in accordance with the laws of the State" are equally descriptive of condemnation as of negotiation. Since Section 4 thus authorizes condemnation of Indian lands for highways only with the permission of the Secretary of the Interior, paragraph 2 of Section 3 should not be interpreted as authorizing condemnation for highways without his permission, for that interpretation would make the statute self-contradictory. Rather the provision of paragraph 2 of Section 3 that allotted lands may be condemned "for any public purpose" should be taken as qualified, as regards condemnation for highways, by the more specific provision of Section 4 that Indian lands can be condemned for highways only with the permission of the Secretary.

Paragraph 2 of Section 3, as applied to condemnation for highways, prescribes the procedure to be followed after permission for the condemnation has been obtained from the Secretary under Section 4, and specifies to whom the award shall be paid. It does not override the express provision of Section 4 that the permission of the Secretary must be obtained for acquisition of Indian land for highways. It further may be that paragraph 2 of Section 3 is a blanket consent to condemnation for purposes for which the consent of the Secretary is

not elsewhere specifically required, but that is not the question here presented.

Congress has wisely made assurance that no highways or roads will be routed across the Indian lands without permitting the Secretary of the Interior to consider whether the passage contemplated by the State or private person might not unduly upset or interfere with the policy of the Federal Government with respect to the Indians left on both sides of the highway. The Secretary may also conclude negotiations settling the problems which come with the roads, including the proper compensation. Or, failing an accord on the terms of purchase, or perhaps in deference to the State's desire to take a strong title through an *in rem* proceeding rather than by purchase, he may merely approve the idea of the road, leaving the just compensation to be determined by a judicial tribunal. But in any event he must authorize the possibility and location of the highway.

And in the exercise of his best judgment with respect to the contemplated highway, the Secretary is, of course, not bound by the desires of the Indians. Congress relied upon the maturity and the experience of the Secretary to safeguard the Indians against their own lack of sagacity, and perhaps against a nearsighted inclination to convert land holdings into more liquid wealth. As this Court said in *Heckman v. United States*, 224 U. S. 413, 444-445:

There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. * * *

Plainly, the resolutions quoted in the Indians' brief, *amicus curiae*, can have no bearing whatever upon the issues in this case.

The petitioner argues (Br. 13-17) that paragraph 1 of Section 3 and Section 4 merely authorize the Secretary to grant easements and permits, that paragraph 2 of Section 3 grants the power to condemn without the permission of the Secretary, and that these two methods of acquiring rights of way are complementary, separate, and distinct. Paragraph 1 of Section 3 authorizes the Secretary to grant "a right of way, in the nature of an easement," for telephone and telegraph lines and offices, and does not clearly cover acquisition by condemnation, either with or without the permission of the Secretary. Section 4, however, is worded entirely differently, and, as has been shown, plainly provides for the granting of permission by the Secretary to condemn lands for highways. The petitioner's interpretation of Section 4 as limited to grants of easements and permits, and as therefore leaving the matter of condemnation wholly to paragraph 2 of Section 3, is accordingly, untenable.

In support of its interpretation the petitioner emphasizes (Br. 13-17) that paragraph 2 was added to the statute as an amendment to the original bill, but that, of course, does not mean that it is not to be read with the rest of the Act.*

The petitioner relies upon and quotes (Br. 18-19) from 49 Lands Decisions, 396 (1923), a ruling of the Department of the Interior that the Act of March 3, 1901, had not been repealed by certain subsequent legislation. In the course of the ruling it is stated that allotted Indian lands can be condemned for public purposes under the Act of March 3, 1901. Similar statements are found in 35 Lands Decisions, 648, 45 Lands Decisions, 563, and in the regulations of the Department of the Interior covering "Rights of Way over Indian Lands," quoted by the petitioner (Br. 19-20).

These rulings and regulations are not, it is submitted, persuasive upon the question before the Court. In the first place, the only one of them which discusses at any length the question of state condemnation of Indian lands—49 Lands Decisions 396—relies upon the earlier ruling in 19 Land Decisions 24, discussed *supra*, pp. 15-16, that lands of the United States can be condemned by a State regardless of whether the United States has consented. A departmental construction of a statute

* Petitioner quotes (Br. 14-15) the full discussion which led to the adoption of paragraph 2. That discussion throws no light upon the interpretation of the paragraph.

posited upon a mistaken conception of constitutional principles is obviously not entitled to weight. Cf. *Helvering v. Powers*, 293 U. S. 214, 224. In the second place, in neither the rulings nor the regulations was the Department faced with condemnation for highways, and none of them mention condemnation for highways or Section 4, wherein that subject is covered. As has been indicated, the position taken in these rulings and regulations may be correct as to condemnation for purposes not specifically dealt with elsewhere than in paragraph 2 of Section 3, but that is not the question here. The same may be said of *Shell Petroleum Co. v. Town of Fairfax*, 180 Okla. 326, 69 P. (2d) 649, discussed by the petitioner (Br. 24-26). It deals with condemnation of land for a well for a municipal water supply, not with condemnation for a highway, and does not mention Section 4, but relies wholly upon paragraph 2 of Section 3.

III

EVEN IF THE ACT OF MARCH 3, 1901, CONSENTED UNCONDITIONALLY TO THE CONDEMNATION OF INDIAN ALLOTMENTS, THE CONDEMNATION PROCEEDING COULD BE BROUGHT ONLY IN FEDERAL COURT

It has been shown that the Act of March 3, 1901, does not consent to the condemnation of Indian trust allotments for highway purposes without the permission of the Secretary of the Interior, and that this suit cannot, therefore, be maintained.

Even if that were not so, it is the position of the Government that the United States is an indispensable party to a proceeding under the Act of 1901, that such a proceeding can, therefore, be brought only in a Federal court, and that since the present suit was brought in a state court it must in any event fail. It is, of course, well settled that if a state court lacks jurisdiction of the subject matter or of the parties to a suit, a Federal court acquires no jurisdiction by removal, even though it would have jurisdiction in a like suit originally brought there. *Goldey v. Morning News*, 156 U. S. 518, 523, 525-526; *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 382; *General Inv. Co. v. Lake Shore Ry.*, 260 U. S. 261, 268; *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, 131.

1. *The United States is an indispensable party to this proceeding*

Since the petition in condemnation recites that the fee of the lands sought to be condemned is held in trust by the United States for Indian allottees (R. 3-10), there can be no doubt that the United States is an indispensable party to this proceeding, unless Congress has provided otherwise. *Bowling v. United States*, 233 U. S. 528, 534-535; *Privett v. United States*, 256 U. S. 201, 204; *Sunderland v. United States*, 266 U. S. 226, 232; *United States v. Colvard*, 89 F. (2d) 312 (C. C. A. 4th). See *Heckman v. United States*, 224 U. S. 413, 437-439, 444-

446. Compare *Laveirge v. Davis*, 166 Minn. 14, 206 N. W. 939, cert. denied, 273 U. S. 714. And, it is submitted, paragraph 2 of Section 3 of the Act of 1901 does not, either expressly or by necessary implication, waive the necessity that the United States be made a party to a proceeding to condemn Indian allotments, even if it be assumed that that section provides for condemnation for highways without the consent of the Secretary of the Interior.

Paragraph 2 of Section 3 provides that allotments may be condemned "under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned". The phrase "in the same manner as land owned in fee may be condemned" obviously means by the same procedure which is followed when land owned in fee is condemned. It does not mean that the United States—the holder of the legal title to the land and the guardian of the Indian holder of the equitable interest—is to be ignored in the proceeding. Furthermore, the final proviso of the paragraph, "and the money awarded as damages shall be paid to the allottee," clearly recognizes that both the United States and the allottee are to be parties to the proceeding, for if the allottee were to be the only party it would be needless to provide that the award should be paid to him. Again, even if procedure, as to which state law controls, includes the question of necessary parties, the Minnesota law

requires that the petition in condemnation name, and that notice be served upon, "all persons appearing of record or known to the petitioner to be the owners" of the property. 2 I. nn. Stat. (Mason, 1927), § 6541. The petitioner, proceeding under this statute, did in fact join the United States as a party in this case (R. 1).

The petitioner argues (Br. 32) that because paragraph 2 of Section 3 does not specifically consent that the United States be made a party to the condemnation proceedings it authorizes it must be inferred that that paragraph makes it unnecessary that the United States be made a party. The same argument is advanced in *Shell Petroleum Co. v. Town of Fairfax*, 180 Okla. 326, 329, 69 P. (2d) 649. The more reasonable inference, it is submitted, is that paragraph 2 of Section 3 does consent that the United States be made a party.

It is utterly unreasonable to suppose that Congress intended to withdraw from Indian allottees the protection of representation of their interest by the United States in suits for the condemnation of their allotments. The fee of the Indian allotments involved in this suit is held in trust by the United States for the allottees.⁸ By the very act of issuing

⁸ The Act of January 14, 1889; 25 Stat. 642, 643, provided for the allotment of these particular lands, allotment to be made in conformity with the Act of February 8, 1887, 24 Stat. 388, known as the General Allotment Act. The latter Act (Sec. 5) provided for a 25-year trust period, the President to have power to extend the period. The original trust periods on the allotments here involved were in fact ex-

trust patents the United States recognized that these Indians were not capable of managing their own affairs; that they had not sufficient business judgment to be trusted with absolute ownership. See *Heckman v. United States*, 224 U. S. 413, 444, quoted *supra*, p. 21. Even in the case of the Five Civilized Tribes, where the United States had issued patents in fee to Indians, but had restricted their power to alienate the land, this Court held that no judgment entered in a suit to which the United States is not a party could affect title to the land. *Bowling v. United States*, 233 U. S. 528, 534-535; *Privett v. United States*, 256 U. S. 201, 204. Congress has since removed the barrier raised by those decisions, but it did so by providing that the United States might be joined in such suits, not that it need not be made a party. Act of April 10, 1926, c. 115, Sec. 3, 44 Stat. 239. The United States has retained greater control of the allotments involved in this case than it did of allotments to Indians of the Five Civilized Tribes; not merely is the power of alienation restricted, but the fee itself is held by the United States.

Less than a month before the Act of March 3, 1901, was passed, Congress indicated that it intended that the United States should retain a close

tended from time to time by executive orders, although that does not appear in the record except as it is to be inferred from the fact that these allotments are still held in trust by the United States. The Act of June 18, 1934, 48 Stat. 984, known as the Indian Reorganization Act, extended the trust period on all Indian allotments indefinitely.

supervision over Indian trust allotments. By the Act of February 6, 1901, 31 Stat. 760, a prior Act which permitted Indian claimants to trust allotments to sue to establish their rights was amended to require specifically that the United States be joined as a party defendant to such suits. In *McKay v. Kalyton*, 204 U. S. 458, this Court said of the amendment (p. 469) :

Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

It cannot be said that Congress thought that the States would adequately protect the interests of Indian allottees in condemnation suits. The supposed permission to condemn does not extend merely to States but to anyone empowered to condemn under state law. While it might have been hoped that the States would themselves protect the interests of Indians in condemnation suits which they brought, such a hope could hardly have been entertained as to everyone authorized to condemn under any state law.

Nor could the United States adequately protect Indian allottees, in suits to condemn their allotments, even if it need not be joined as a party itself,

by furnishing them legal assistance. Many such suits would never come to the attention of the United States at all if it were not joined as a party defendant. Treaties or statutes providing for the cession of Indian lands to the United States, and for the removal of the tribe elsewhere, have usually provided that individual Indians who so chose could select an allotment from the ceded lands and remain behind. That was, in fact, the origin of the allotments in this case. See Act of January 14, 1889, sec. 3, 25 Stat. 642, 643. Allotments of such origin are widely scattered, and often the United States would have no notice whatever of suits to condemn them unless, as was done in this case, it was made a party to the suit.

2. *This proceeding could not be brought against the United States in a state court*

The Act of March 3, 1901, does not specify where the condemnation proceedings it authorizes must be brought; it provides that state law shall control as to procedure, but says nothing as to the forum in which the proceeding must be initiated. In *Shell Petroleum Corp. v. Town of Fairfax, supra*, 180 Okla. at 329, the court considered that the provision that the lands be condemned for any public purpose under the laws of the State in the same "manner" as land owned in fee constituted an adoption of the same court and the same procedure. It is submitted that the word "manner," like its

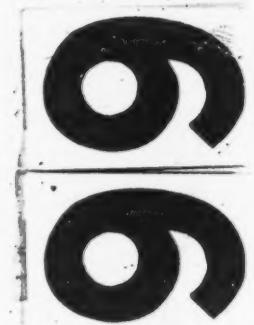
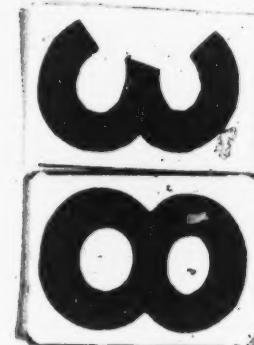
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synonym "mode," refers merely to the procedure utilized in the state proceedings. There is certainly nothing anomalous about utilizing the state procedure in the Federal courts, for that is the established course utilized with respect to condemnation by the United States. Act of August 1, 1888, c. 728, Secs. 1, 2, 25 Stat. 357, 40 U. S. C., Secs. 257, 258. Since the Act is silent on the point, it should, the Government contends, be interpreted as consenting to condemnation proceedings only in the Federal courts, and not in the state courts.

That the Act should not be interpreted as consenting that the United States be sued in state courts follows, in the first place, from the principle that Acts consenting to suits against the United States are to be strictly construed. See *Eastern Transportation Co. v. United States*, 272 U. S. 675, 686:

The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires.

See also *United States v. Michel*, 282 U. S. 656, 659.

In the second place, it is almost unknown for Congress to consent that the United States be sued in a state court. In *Stanley v. Schwalby*, 162 U. S. 255, wherein the Court distinguished *United States v. Lee*, 106 U. S. 196, this Court said (p. 270):

The United States, by various acts of Congress, have consented to be sued in their own

courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case.

To the same effect, see *United States v. Inaba*, 291 Fed. 416, 418 (E. D. Wash.); *United States v. Deasy*, 24 F. (2d) 108, 110 (D. Idaho); *Cowperthwaite v. Wallworth*, 105 N. J. Eq. 657, 149 Atl. 353; Hughes, *Federal Practice* (1931), Sec. 363.

The position for which we contend is in no way weakened by *United States v. Bank of New York Co.*, 296 U. S. 463, involving state proceedings for the liquidation of Russian insurance companies, and holding that the United States should file its claims against the assets of such companies in the state proceedings. This Court was careful to point out that the United States "would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant" (p. 480). The *ratio decidendi* of the decision was "that the United States is free to *invoke* the jurisdiction of the state court for the determination of its claim, * * *" (p. 479; italics added). The decision in no way modifies the settled doctrine that statutes expressing the consent of the United States to be sued must be strictly construed.

Indeed, our position is supported by the fact that in cases where the United States would have been forced to litigate its rights in the state court as party defendant, it has uniformly been held that the United States need not intervene in pending litigation in state courts to protect its property

interests, but may bring suit in the Federal courts to protect those interests, irrespective of pending state court suits. *United States v. Babcock*, 6 F. (2d) 160 (D. Ind.), mod. 9 F. (2d) 905 (C. C. A. 7th); *United States v. McIntosh*, 57 F. (2d) 573, 578 (E. D. Va.), cited as controlling in its companion case, *Prince William County v. United States*, 79 F. (2d) 1007 (C. C. A. 4th), certiorari denied, 297 U. S. 714; *United States v. Deasy*, *supra*.

In the only two instances which we have found of consent by Congress that the United States be sued in state courts, each of the statutes names state courts specifically, provides for service upon the United States, and provides that any suit brought under it may be removed by the United States to a Federal court. See Act of April 10, 1926, c. 115, 44 Stat. 239; Act of March 4, 1931, c. 515, 46 Stat. 1528.*

It is submitted, therefore, that the Act of 1901 should not be construed as consenting to suit in state courts.

* The first of these Acts is the statute, referred to *supra*, p. 27, providing for joining the United States in suits respecting restricted lands of Indians of the Five Civilized Tribes. The second Act consents that the United States be named a party in suits for the foreclosure of a lien upon real estate, for the purpose of securing an adjudication as to any lien the United States may have on the property.

* Regulation 69½ of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," adopted in the general revision of April 7, 1938, provides: "As the holder of the legal title to allotted Indian

IV

THE ACT OF MARCH 3, 1901, INSO FAR AS IT DEALT WITH THE CONDEMNATION OF INDIAN LANDS, WAS REPEALED BY THE INDIAN REORGANIZATION ACT

The Government has shown that the Act of March 3, 1901, did not authorize the condemnation of Indian lands for highway purposes without the permission of the Secretary of the Interior, and, in any event, did not purport to confer jurisdiction upon state courts in such proceedings. It further contends that the Act of March 3, 1901, insofar as it dealt with the condemnation of Indian lands, whether for highway or other purposes, was repealed by the Indian Reorganization Act.

The Act of June 18, 1934, 48 Stat. 984, known as the Indian Reorganization, or Wheeler-Howard Act, is set out in full in the Appendix, *infra*, p. 49. The provisions of the Act which, the Government contends, repealed any authorization in the Act of March 3, 1901, for the condemnation of Indian lands are found in paragraph 2 of Section 3 and in Section 4. They read:

SEC. 3.

* * * * *

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes;

lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the appropriate federal district Court, the procedure, however, to follow the provisions of the State law on the subject, so far as applicable."

SEC. 4. Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: * * *

The words of Section 4, "Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved" plainly include condemnation of Indian lands as well as other modes of transfer. Any doubt on that score is eliminated by the proviso in paragraph 2 of Section 3 of the Indian Reorganization Act that "Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way." For this explicit reservation of one method by which rights of way across Indian lands might be acquired plainly indicates that no other method was meant to survive.

That the Indian Reorganization Act repealed the Act of March 3, 1901, as regards condemnation of Indian lands, is shown not only by the phraseology but by the basic purpose of the Indian Reorganization Act. That purpose, as stated by its co-authors, Senator Wheeler and Congressman Howard, was to stop the alienation of Indian lands. (See 78 Cong. Rec. pp. 11123, 11726, 11727.) Further allotment of lands to Indians in severalty was forbidden (Sec. 1), existing trust periods were extended indefinitely (Sec. 2), surplus reservation lands were to be restored to tribal ownership (Sec. 3), all transfer of Indian lands, with exceptions not here material, was forbidden (Sec. 4), and money was appropriated for the acquisition of additional lands for Indians (Sec. 5). This Act completely reversed the policy which had theretofore been in effect, and which was in effect when the Act of March 3, 1901, was adopted. See Annual Report of the Secretary of the Interior, 1933, p. 108; and, generally, Kinney, A Continent Lost—A Civilization Won: Indian Land Tenure in America (1937), especially p. 311. Thus both the words and policy of the Indian Reorganization Act plainly supersedes the condemnation provisions of the Act of March 3, 1901.

The petitioner argued in the court below^{*} that because the state commissioner of highways had

* The question of repeal of the Act of March 3, 1901, by the Indian Reorganization Act has not been briefed by the petitioner in this Court.

definitely located the right of way of the road for which the lands are here sought before the Indian Reorganization Act was passed, that Act could not affect the right to maintain the present proceeding. Presumably, it was meant to contend that the lands were taken when the commissioner located the right of way and that title passed at that time. The Minnesota decisions are, however, clear that the location orders of the commissioner did not vest title in the State, and constituted merely a "preliminary step" looking toward the acquisition of the property. *State v. Erickson*, 185 Minn. 60, 63, 239 N. W. 908 (overruled on other points in *State v. Stanley*, 188 Minn. 390, 247 N. W. 509); *State v. Lesslie*, 195 Minn. 408, 263 N. W. 295. Under the Minnesota decisions title to land condemned does not pass until the final award is fully paid, although, as a matter of convenience, damages are computed upon the assumption of a taking as of the time of the filing of the award of the compensation commissioners. *City of Minneapolis v. Wilkin*, 30 Minn. 145, 15, N. W. 668; *Ford Motor Co. v. City of Minneapolis*, 147 Minn. 211, 215, 179 N. W. 907. It is clear, therefore, that the repeal of the Act of 1901 by the Indian Reorganization Act was effective to bar this proceeding.

V

THE TREATY OF SEPTEMBER 30, 1854, BETWEEN THE
UNITED STATES AND THE CHIPPEWA INDIANS DOES
NOT AUTHORIZE THE STATE TO TAKE THE LANDS
HERE SOUGHT

The petitioner contends (Br. 33-36) that it is authorized to take the lands sought to be condemned in this proceeding by the treaty between the United States and the Chippewa Indians of September 30, 1854, 10 Stat. 1109. That treaty provides:

ARTICLE 3. * * * [the President] may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

It is the final sentence upon which the petitioner relies.

There are several reasons why this provision has no relevance to the present case.

1. The treaty dealt with rights only as between the Chippewas and the United States; it did not grant to States or to private interests rights as against both. The phrase "compensation being

made therefor as in other cases," upon which the petitioner particularly relies (Br. 33), when viewed in the light of the provision immediately preceding it, plainly means that compensation shall be made by the President by assigning to the Indians other lands in lieu of any taken for rights of way, and not, as the petitioner assumes, that compensation shall be made as in other condemnation proceedings.

2. The Treaty of 1854, including the provision as to rights of way, was probably repealed as regards the Grand Portage Reservation (in which the lands here sought lay) by the Act of January 14, 1889, c. 24, 25 Stat. 642, which provided for the cession to the United States of the Grand Portage Reservation, the right being reserved to individual Indians who so chose to take allotments from the ceded lands.¹

3. If the Treaty of 1854 ever had any bearing upon the right of the State to condemn Indian lands, and if it was not repealed by the Act of January 14, 1889, it clearly was repealed by the Act of March 3, 1901 (31 Stat. 1058), discussed *supra*, p. 16 *et seq.*

¹The petitioner consistently speaks of the Act of January 14, 1889, as approving the Treaty of 1854 (Br. 7, 8-9, 33). The statute does not mention the treaty and it is difficult to see why the petitioner refers to it as approving the treaty, unless the petitioner is under the misapprehension that the treaty was not valid unless ratified by an Act of Congress.

Both the petitioner and the United States agree that the Act of March 3, 1901, fully covers the subject of condemnation of allotted Indian lands for highways; the petitioner contends that the Act expressly grants the right to condemn, while the United States contends that the Act expressly makes the permission of the Secretary of the Interior a prerequisite to any such condemnation. Whichever interpretation is correct, the Act of 1901 fully covers acquisition of Indian lands for highways.

4. If the treaty provision had not theretofore been repealed by implication, it was repealed by the Indian Reorganization Act, discussed, *supra*, p. 33 *et seq.*

VI

THE STATE HAS NO POWER TO CONDEMN PARCEL 5 OF THE LANDS HERE SOUGHT, BECAUSE IT IS TRIBAL LAND

The Government has shown that the Act of March 3, 1901, did not consent to the condemnation of allotted Indian lands for highway purposes without the permission of the Secretary of the Interior, and that, insofar as it dealt with condemnation, that Act was, in any event, repealed by the Indian Reorganization Act. Even if both of these contentions are unsound, however, the State would still have no power to condemn Parcel 5 of the lands sought in this proceeding, because that tract is tribal land.

Parcel 5 was formerly owned by Quodonce, an Indian allottee, but was conveyed by him to the United States in trust for the Grand Portage Band of Chippewa Indians (R. 47-55); see *supra*, p. 5. There can be no contention that the Act of March 3, 1901, consents that Indian tribal lands be condemned without the permission of the Secretary of the Interior; paragraph 2 of Section 3 applies only to allotted lands, and Section 4, which applies both to allotted and tribal lands, makes the permission of the Secretary of the Interior a prerequisite to acquisition. See *United States v. Colvard*, 89 F. (2d) 312, 314-315 (C. C. A. 4th). By the conveyance to the United States in trust for the tribe, Parcel 5 was, therefore, withdrawn from the operation of paragraph 2 of Section 3 of the Act of March 3, 1901, and ceased to be subject to condemnation by the State.

The petitioner contended in the courts below, however, and the District Court held (R. 65), that because the conveyance of Parcel 5 from Quodonce to the United States in trust for the tribe was made with notice of the pendency of the condemnation proceeding, it could not affect the right of Minnesota to condemn the parcel.^{*}

It is conceded that on February 20, 1936, when the United States accepted the Quodonce option of January 22, 1936, it had notice of the present condemnation proceeding, filed February 6, 1936. It

* The petitioner has not briefed this question in this Court.

had been served as a party (R. 21-22) and a notice of *lis pendens* had been filed (R. 38). But to contend that for that reason the conveyance was ineffective to terminate any right possessed by the State to condemn the conveyed land is to overlook fundamental and well established principles of law.

As shown by the discussion, *supra*, p. 11 *et seq.*, paragraph 2 of Section 3 of the Act of March 3, 1901, assuming that it consents that allotted Indian lands be condemned, does two things: it removes the jurisdictional barrier inherent in the fact that a suit to condemn Indian lands must be brought against the United States, which cannot be sued without its consent, and it removes the substantive barrier that such lands cannot be acquired without the consent of the United States. By withdrawing Parcel 5 from the operation of paragraph 2 the United States restored both barriers: it withdrew its consent to be sued with respect to that parcel, and it withdrew its consent that that parcel be acquired. Under the decisions of this Court the United States had full power to do either or both, regardless of pending litigation, at any time before title to the parcel passed from it. That title has not passed in this case is shown, *supra*, p. 36.

The United States may at any time withdraw its consent that it be sued. See *Lynch v. United States*, 292 U. S. 571, 581-582; *Cummings v. Deutsche Bank*, 300 U. S. 115, 119; *Perry v. United States*, 294 U. S. 330, 360 (concurring opinion). As said in the *Lynch* case (pp. 581-582):

* * * consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration [citing cases].

Consent to sue the United States may be withdrawn even after suit has been brought. See *De Groot v. United States*, 5 Wall. 419, 432; *Kogler v. Miller*, 288 Fed. 806, 808 (C. C. A. 3d); *Synthetic Patents Co. v. Sutherland*, 22 F. (2d) 491, 494 (C. C. A. 2d); *Imhoff-Berg Silk Dyeing Co. v. United States*, 43 F. (2d) 836, 841 (D. N. J.). Compare *Gordon v. United States*, 7 Wall. 188, 195. Similarly, a State may withdraw its consent even after suit has been brought, although, unlike the United States, States are subject to the obligation of contracts clause. See *Beers v. Arkansas*, 20 How. 527, 529-530; *Hans v. Louisiana*, 134 U. S. 1, 17. There can, accordingly, be no doubt that Congress had power to withdraw its consent that the present proceeding be brought against the United States, as to part or all of the land sought to be condemned, even after the proceeding had been commenced and the *lis pendens* filed.

Looking at the question in its substantive aspect, neither is it doubtful that the United States had power to withdraw its consent to the acquisition of Parcel 5. The United States had not entered into a contract with the State to sell it the land. It had

merely conferred upon the State a privilege to acquire the land, and that privilege it could withdraw at any time before the State had actually acquired it. Compare *The Yosemite Valley Case*, 15 Wall. 77, 87; *Frisbie v. Whitney*, 9 Wall. 187; *United States v. Midwest Oil Co.*, 236 U. S. 459, 474.

Even if Parcel 5 had been ordinary privately owned land when this proceeding was started, it would not follow that the United States could not, by purchasing the land, have withdrawn it from the State's power to condemn. As shown *supra*, p. 14, the United States can condemn even land owned by a State. If it could condemn Parcel 5 after it was acquired by the State, why would not purchase pending condemnation be effective to defeat condemnation? But whatever view might be taken as to the effect of a purchase by the United States of ordinary privately owned lands during the pendency of a proceeding by a State to condemn them, it is clear that the United States can defeat, at any time before title is taken, a condemnation proceeding by a State to condemn lands of the

* It may be that if the United States buys a claim to land, the title to which is in litigation, with notice of the litigation, the United States takes subject to the outcome of the litigation. It has been so held. *United States v. Mayse*, 5 F. (2d) 885 (C. C. A. 9th); see *Ward v. Congress Construction Co.*, 99 Fed. 598 (C. C. A. 7th). In such a case it would be undesirable that purchase by the United States during litigation should defeat a claimant's attempt to establish his title. That consideration is, however, not applicable to this case. The State is not seeking to clear its title, but to acquire the title of the Indians and the United States.

United States. And that is all that is involved here. Under the Minnesota law the State, providing it does not take possession, is free to abandon the proceeding at any time before the final award of the commissioners, or, if appeal is taken, at any time before the final judgment of the court. *State v. Lesslie*, 195 Minn. 408, 263 N. W. 295; *Fletcher v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1085; *Minneapolis-St. P. Sanitary Dist. v. Fitzpatrick*, 197 Minn. 275, 266 N. W. 848. It is no more unfair for the United States to make use of its right to terminate the proceeding than it would be for the State to exercise its undoubted right to do so.

CONCLUSION

A State cannot, without the consent of the United States, condemn lands held by the United States in trust for individual Indians or for an Indian tribe. The Treaty of September 30, 1854, if it ever authorized condemnation by States or private interests, has been superseded by subsequent legislation. The Act of March 3, 1901, requires the permission of the Secretary of the Interior for the condemnation of tribal lands for any purpose, and Parcel 5 of the lands here sought is now tribal land. That Act likewise requires the permission of the Secretary of the Interior for condemnation of allotted lands for highway purposes, and in any event it was repealed, insofar as it dealt with condemnation, by the Indian Reorganization Act of 1934. It is sub-

mitted, therefore, that the judgment of the Circuit Court of Appeals should be affirmed in its entirety; that whatever view is taken as to the interpretation of the Act of March 3, 1901, and of the Indian Reorganization Act, the judgment below should be affirmed as to Parcel 5.

Respectfully submitted.

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NOVEMBER 1938.

APPENDIX

Treaty with the Chippewas, Sept. 30, 1854, 10
Stat. 1109, 1110:

ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules

and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction thereing and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Text of the Indian Reorganization, or Wheeler-Howard, Act of June 18, 1934, c. 576, 48 Stat. 984:

AN ACT To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any land so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable

Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of \$1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treasury of the United States to the credit of the Pa-

pago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of \$1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further,* That the Secretary of the Interior may authorize voluntary exchanges

of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations; *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed \$250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior,

in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Sec. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Sec. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed \$250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than \$50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Sec. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, with-

out regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years,

and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revo-

cable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

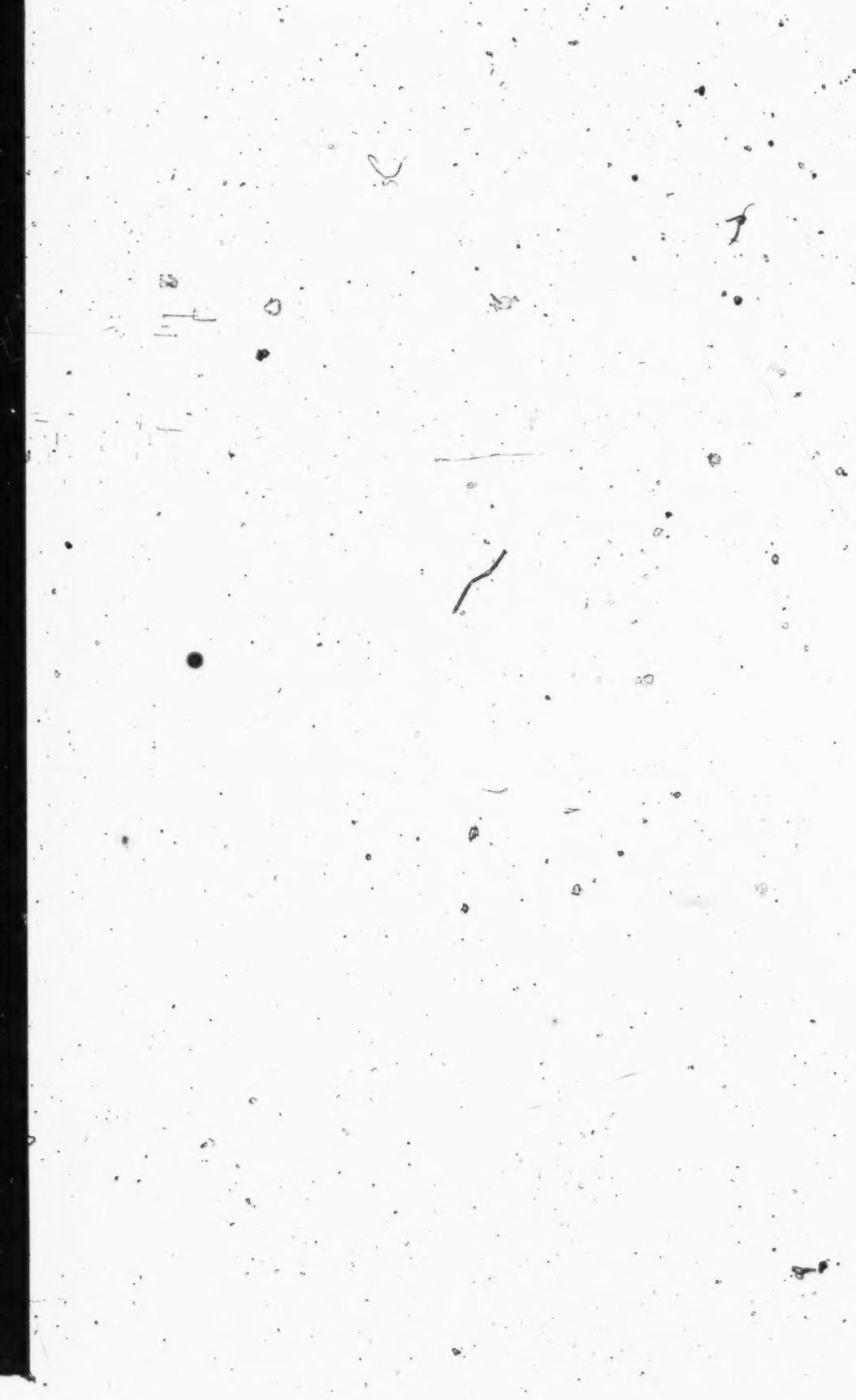
SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the con-

duct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

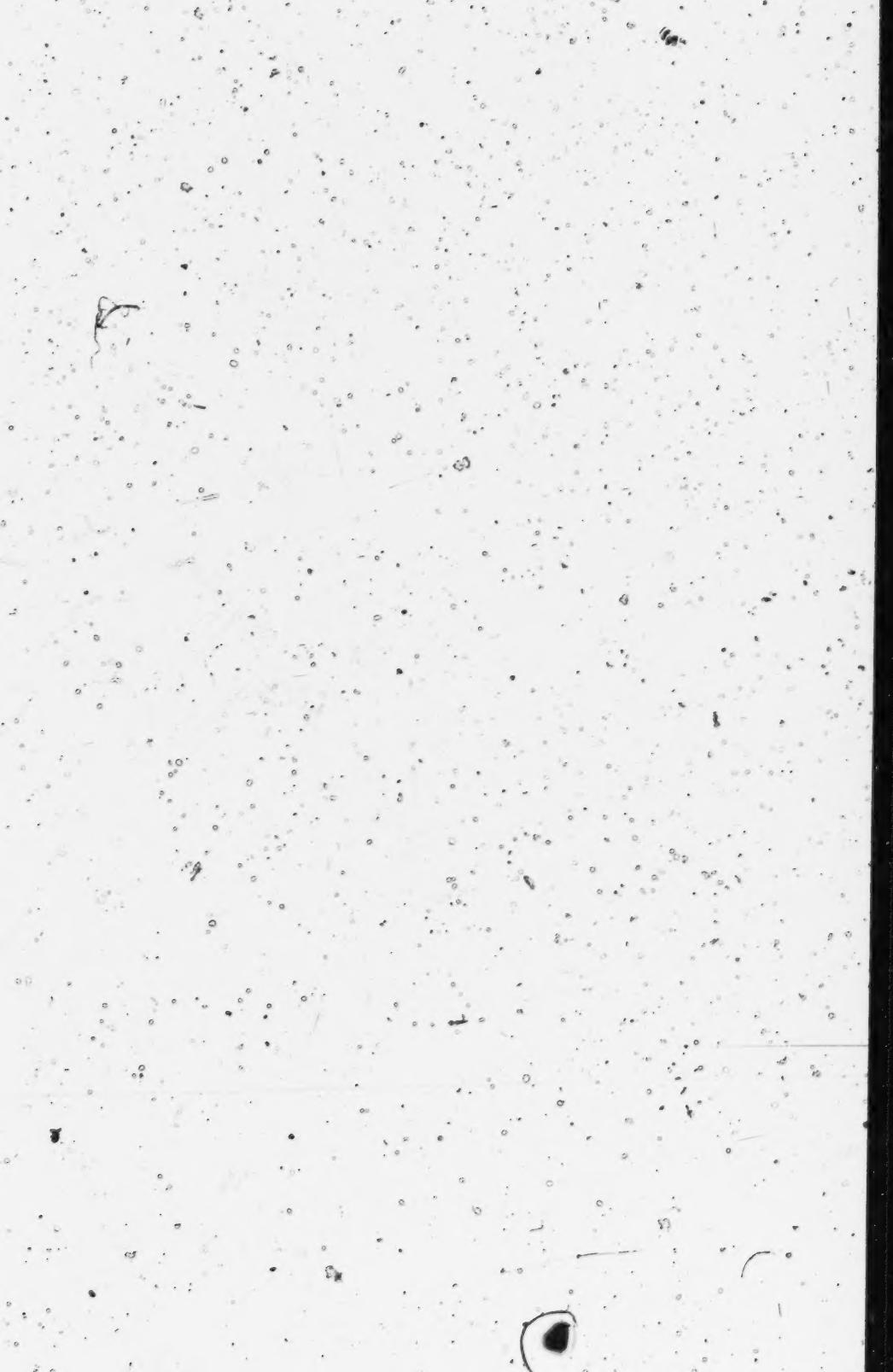
Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved June 18, 1934.







In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED
STATES

Pursuant to the request of the Court on November 10, 1938, at the oral argument of this case, the following letter was sent by the Solicitor General to the Secretary of the Interior:

OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C., November 10, 1938.

The Honorable, The SECRETARY OF THE
INTERIOR,
Washington, D. C.

MY DEAR MR. SECRETARY:

In re: *Minnesota v. United States.* United
States Supreme Court, October Term,
1938, No. 73.

In the course of the argument of the above
entitled case in the United States Supreme

Court today, the Court requested to be advised with respect to the administrative practice of your Department concerning condemnation of allotted Indian lands for highway purposes.

An important question in the case is the proper construction of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083.

Section 3, paragraph 2, provides:

"That lands allotted in ~~severalty~~ to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Section 4 provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation."

The Government took the position that although Section 3 may express the consent of the United States to proceedings for the condemnation of allotted Indian lands, Section 4 contains an overriding qualification in the

case of condemnation for highway purposes, namely, that the Secretary of the Interior approve the establishment of a highway, i. e., approve the idea of and location of the proposed road.

The State of Minnesota took the position that Section 3 authorizes the condemnation of Indian lands by the states without regard to the approval of the Secretary of the Interior. Its brief states in part (see pp. 22-23):

"For example, the State of Minnesota by its Attorney General during the past ten years has successfully concluded six separate condemnation proceedings for highway purposes for the taking of lands allotted in severalty to individual Indians. These proceedings were instituted and completed in the State courts and included land in Carleton, Itasca, Cass, St. Louis, and Becker Counties and involved the taking for trunk highway purposes of 79 separate parcels of allotted Indian lands. In all of these condemnation proceedings the individual Indians were named as respondents, as well as the Indian Superintendents. The Department of Interior likewise in these cases fully cooperated with the State in conformity with the established practice and procedure and regulations of said Department concerning the acquirement of right of way for public purposes through such allotted lands, pursuant to the rules and regulations of the Department of Interior heretofore referred to (Regulation 70, supra, Department of In-

terior). It is pointed out and stressed that the present proceeding is in all respects similar to the other six condemnation actions. The instant case marks the first time in which the United States through the Department of Interior has objected in any wise or manner to the acquirement of right of way for a state and national trunk highway through allotted Indian lands.

"In none of these cases was the express consent of the Secretary of Interior obtained, which the Circuit Court now holds to be necessary (R. 90). The State, therefore, in accordance with the Department of Interior's regulations 68 and 69, supra, conducted its condemnation proceedings pursuant to Section 357, which proceedings, the regulations state, are authorized by such section and that any purpose for which private lands could be condemned under state laws is held to be a public purpose within the meaning of said Section 357."

The Court requested that it be advised by November 15, 1938, of the actual practice with respect to the condemnation of allotted Indian lands for highway purposes.

It would be appreciated, therefore, if you would advise this Department, as soon as possible, with respect to the following matters:

1. Prior to the present proceeding, have any allotted Indian lands been condemned under the laws of a State or Territory for highway purposes?

If so, with respect to each condemnation proceeding—

2. In what court was the proceeding brought?

3. Was the United States or any Government official made a party defendant?

4. What was the outcome of the proceeding?

5. At what stage of the proceeding was the Secretary of the Interior advised thereof?

6. If the Secretary of the Interior gave his permission to the establishment of the road, at what stage of the proceeding and in what form was such permission given?

7. If no such permission was given, did the Secretary of the Interior express any objection to the proposed highway?

8. What has been the position of the Department with respect to such proceedings?

Respectfully yours,

ROBERT H. JACKSON,

Solicitor General.

The following reply to the foregoing letter has been received:

UNITED STATES DEPARTMENT
OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, November 14, 1938.

The Honorable THE ATTORNEY GENERAL.

In re: *Minnesota v. United States*, No. 73,
U. S. Sup. Ct., Oct. Term, 1938.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to the Solicitor General's let-

ter of November 10, requesting certain information concerning the condemnation of restricted allotted Indian lands under the Act of March 3, 1901 (31 Stat. 1058, 1083).

Careful examination has been made of all the files available to this Department within the limited time indicated by your letter. These cover only cases since 1906, when the present filing system with index cards was instituted.

Three cases have been found involving the construction of highways across allotted Indian lands in Minnesota.

(1) In 1932 a proceeding was brought in a state court in Cass County, Minnesota, to condemn allotted Indian lands for highway purposes in that county. The Superintendent of the Indian Agency was joined as a party defendant. This Department took the position that the proceeding in the state court was a nullity; and that any condemnation proceedings by the State had to be brought in Federal Court, and the United States joined as a party defendant. Eventually, the State requested the permission of the Secretary of the Interior for the opening of the road under Section 4 of the Act of 1901, and a right of way was granted on the regular form used for the purpose. The files do not specifically indicate whether the state proceedings were dismissed.

(2) A second suit to condemn allotted Indian lands for highway purposes was brought in 1932 by the State of Minnesota in the state court in St. Louis County. The

Superintendent of the Agency was joined as a party defendant to this suit. However, contrary to his instructions, he neglected to inform the Washington Office of the Department of the Interior of the suit until after its termination. This Office again took the position that the suit should have been brought in a federal court, and the United States made a party. Thereafter the State applied to the Secretary of the Interior for permission to open the highway and the Secretary granted a right of way.

(3) In 1933 the Superintendent of the Consolidated Chippewa Agency brought to the attention of the Commissioner of Indian Affairs the fact that the State of Minnesota had constructed, in 1930, a public highway across five restricted Indian allotments, in Itasca County. The road had been constructed without either application to the Secretary of the Interior for right of way, or, apparently, condemnation proceedings. The Superintendent was advised by the Commissioner of Indian Affairs that it would be necessary for the State to procure a right of way by application to the Secretary of the Interior. After negotiation, the State Highway Commissioner formally submitted application for right of way under the Act of 1901 and that application was approved by the Assistant Secretary of the Interior.

Research in the Department's records has not disclosed any case in which the State of Minnesota has acquired title to restricted

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allotted lands, for highway purposes, by virtue of its condemnation proceedings. If such proceedings took place, and the superintendents of the agencies were notified, they neglected to advise the Washington Office of the Department thereof.

The following summarizes the contents of the files of the Department with respect to proceedings for the condemnation of allotted Indian lands in states other than Minnesota.

(1) In 1910 a condemnation suit was filed in an Idaho State court for the condemnation of lands included in six Indian allotments. Neither the United States nor the Secretary of the Interior was made a party to the proceeding. It was reported to the Secretary of the Interior that the proceedings involved the acquisition of land for a public highway, and May 13, 1910, this Department suggested to the Attorney General that instructions be issued to the United States Attorney to resist the proceeding on the ground that restricted allotted lands were not subject to condemnation under the Act of March 3, 1901. On May 16, 1910, the Attorney General advised the Secretary of the Interior that the United States Attorney would be instructed to challenge the jurisdiction of the court on the ground that Section 4, of the Act of 1901, placed the matter entirely under the Secretary of the Interior. It later developed that the suit did not involve the acquisition of a public highway but was confined to condemnation of the lands for a building site.

(2) In 1926 Oklahoma applied to the Secretary of the Interior, under Section 4 of the Act of March 3, 1901, for permission to open a public highway across certain Kiowa restricted allotted lands. The Department officials expressed considerable objection to the location, and the State officials relocated the proposed highway in order to meet these objections. Subsequently the State officials, complaining of the Department's appraisal of value, instituted condemnation proceedings in a state court, and served notice on officials of this Department. Before further proceedings were had, state officials agreed in substance to this Department's appraisal, an amicable settlement was reached, and permission was subsequently granted by the Secretary of the Interior under Section 4 of the Act of March 3, 1901.

(3) Proceedings to condemn allotted Indian lands for a highway were filed in an Oklahoma state court in 1927. It does not appear from the files who were served as parties defendant, although it does appear that the Secretary of the Interior had immediate notice of the suit. The Secretary took the position that the suit must be brought in federal court, with the United States joined as party defendant. Subsequently, the Secretary granted a right of way under Section 4 of the Act of 1901 and the state court proceedings were dismissed.

(4) A proceeding to condemn allotted Indian lands for highways was filed in an Okla-

homa state court in 1929. Only the Indian allottees were joined as parties defendant. The permission of the Secretary of the Interior under Section 4 of the Act of March 3, 1901, had been asked and refused before the suit was brought. The Secretary took the position that the suit should have been brought in the federal court and the United States joined as a party. This suit was eventually dismissed by the State because it determined to relocate the proposed highway.

(5) In 1929 condemnation proceedings were instituted by the State of Washington to condemn for highway purposes the right of way across four Indian allotments on the ~~Sycomish~~ Indian Reservation. The United States was made a party to the suit, and the suits removed to the federal court. The jury made awards regarded by the Attorney General as very liberal.

(6) Five suits to condemn land included in Indian allotments were instituted in a Washington state court in 1931. The file does not show whether the Secretary of the Interior or the United States was named as a party. The Superintendent notified this Department of the pending cases. In 1932, the First Assistant Secretary of the Interior advised the Attorney General of this litigation and stated that the Department of the Interior, as it had informed the Attorney General in connection with other similar cases some years before, took the position that a state court had no jurisdiction over a

suit to condemn restricted Indian lands, that the United States was an indispensable party to such a suit, and that such a suit must be brought in a federal court. In reply the Department of Justice advised that the United States Attorney had been instructed to appear in the state court proceeding and suggest that the United States was a necessary party and that the court had no jurisdiction. Subsequently, the State filed an application and on March 19, 1932, the Secretary of the Interior granted the right of way pursuant to Section 4 of the Act of 1901.

(7) In 1932 the State of Wisconsin proposed to secure a right of way across Indian allotments by condemnation. However, before any proceeding was brought, negotiations between the State and the Secretary of the Interior resulted in the granting of a right of way by the Secretary, under Section 4 of the Act of 1901. In the correspondence relative to the proposed condemnation the Secretary took the position that any suit must be brought in the Federal court, with the United States as an indispensable party thereto.

(8) A proceeding to condemn allotted Indian lands was commenced in an Oklahoma state court in 1937. Only the Indian allottees were joined as party defendants. This suit is still pending and action on it has by agreement been held up awaiting the determination of *United States v. Mine-*

sota, now pending in the United States Supreme Court.

It is hoped that the foregoing presents the information requested by the letter of your Department. The examination made of the files of this Department does not indicate any basis for the statements made in the brief of the State of Minnesota at pp. 22-23, and quoted in the letter of your Department, to the effect that the State of Minnesota during the past ten years has successfully concluded six separate condemnation proceedings for the taking for highway purposes of lands allotted in severalty to individual Indians (if the statement in the brief of the State of Minnesota is taken to refer to restricted or trust allotments, rather than unrestricted lands); and to the effect that this Department cooperated with these proceedings in conformity with its established practice and procedure. It cannot be said that the instant case marks the first time in which the United States has objected in any manner to the acquirement of right of way for a state highway through allotted Indian lands.

Since the only issue raised with respect to state condemnation of restricted Indian lands relates to the departmental practice, it has seemed unnecessary to attempt to secure from the individual superintendents of the several Indian reservations instances which they may recollect of condemnation proceedings, if any exist, which have not been reported to the Department in Wash-

ington; nor would such an inquiry have been practicable within the limited period of time.

Respectfully yours,

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

It is hoped that this letter furnishes the information sought by the Court. The Government will be pleased to endeavor to supply any additional or supplemental information which may be desired by the Court.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

CARL MCFARLAND,
Assistant Attorney General.

MAC ASHILL,
Special Assistant to the Attorney General.

NOVEMBER 1938.







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IN THE
**Supreme Court of the
United States**

October Term, 1938

No. 73

STATE OF MINNESOTA, by its Attorney General,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

*On Writ of Certiorari to the United States Circuit Court of
Appeals for the Eighth Circuit.*

BRIEF OF MINNESOTA CHIPPEWA TRIBE AND
GRAND PORTAGE-GRAND MARAIS BAND,
SUBSIDIARY ORGANIZATION OF SAID
TRIBE; AMICUS CURIAE.

INTRODUCTORY STATEMENT.

The Minnesota Chippewa Tribe is now, and at all times mentioned in the Brief of the State of Minnesota was, a

tribal organization, organised under and pursuant to Section 16 of the Act of June 18, 1934 (48 Stats. 984) as amended (49 Stats. 378), an Act commonly known as the Wheeler-Howard Act or the Indian Reorganization Act.

Under the powers conferred by said Act and in accordance with its provisions, the Chippewa Indians of the State of Minnesota, comprising approximately 14,000 in number not including the Chippewa Indians located on the Red Lake Reservation, on June 20, 1936, duly ratified, by popular vote, a Constitution, which Constitution is now in full force and effect. Thereafter, and on the 18th day of November, 1937, there was duly issued by the Department of the Interior of the United States Government, to said Minnesota Chippewa Tribe, a corporate charter, which corporate charter is now in full force and effect.

This Brief is filed in behalf of said Minnesota Chippewa Tribe and the Grand Portage-Grand Marais Band, a unit thereof.

The Grand Portage-Grand Marais Band of Chippewa Indians are wholly without funds with which to properly prosecute this action by original petitions or otherwise and to submit an exhaustive brief, *amicus curiae*. Owing to this fact, it is believed the Supreme Court of the United States will take judicial notice thereof. The said Band of Chippewa Indians respectfully submit and urge the consideration by the Court of this Brief Memorandum.

STATEMENT OF CASE.

For the sake of brevity, and to save repetition, the Grand Portage-Grand Marais Band of Chippewa Indians respectfully refer the Honorable Court to the Statement of the Case as set forth in the Brief of the State of Minnesota filed herein.

ARGUMENT.

The Grand Portage-Grand Marais Band herewith incorporate by reference the full text of the Argument contained in the Brief filed by the State of Minnesota herein, but, in addition thereto submit herewith the following salient facts and law for the attention of the Court.

State trunk highway No. 61 involved herein traverses the Indian Reservation of the Grand Portage-Grand Marais Band. All the right of way for this necessary public improvement in the Reservation itself has heretofore been legally purchased by the State of Minnesota, with the exception of the several parcels of allotted lands affected in this proceeding. The Grand Portage-Grand Marais Band of the Minnesota Chippewa Tribe desires the location and construction of this important highway as now designated by the Commissioner of Highways of the State of Minnesota. While there is no express law giving the tribe itself any authority by consent or otherwise to permit the construction of this proposed highway, yet the very spirit of the Indian Reorganization Act of June 18, 1934 (48 Stats. 984), as amended by the Act of June 15, 1935 (49 Stats. 378) did bestow, we believe, upon the Chippewa Indians of Minnesota a voice in their own affairs on a matter of such vital importance as the construction of a road which would serve the community of Grand Portage in the manner set forth in the Resolutions adopted by said Tribe and the Band thereof, as hereafter set forth in full.

In view thereof, it appears to the members of the Chippewa Indian Tribe that the Bureau of Indian affairs of the Department of Interior and the Department of Justice, in opposing the condemnation proceedings of the State of Min-

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nesota, has adopted and is apparently pursuing a course of action diametrically opposed to the best interests of the members of said tribe and contrary to their wishes. The Grand Portage-Grand Marais Band of Chippewa Indians have never had an adequate road leading from the Grand Portage Reservation and particularly the Indian community located at Grand Portage, Minnesota. They have lacked sufficient facilities to adequately transport their children to the high school at Grand Marais. They have lacked facilities for transportation of fish and other articles produced by said Tribe, and at many seasons of the year the existing roads serving them have been wholly impassable.

This tribe sees no reason why it should not be afforded the same traveling facilities with a modern good road of the same type and kind which have been afforded their white brethren and neighbors by the State of Minnesota in the northeastern part of the state.

The government's opposition in this case and its theory that the State of Minnesota cannot condemn allotted lands for a public purpose is both a surprise and a disappointment to this tribe. Allotted lands held by individual Indians of this tribe have in the past been acquired for various public purposes through orderly condemnation proceedings pursuant to the Act of March 3, 1901, Chapter 832, Section 3, 31 Stats. 1084 (25 U. S. C. 357). Ever since the Treaty of September 30, 1854 (10 Stats. 1109) and the Act of Congress approving, January 14, 1889 (25 Stats. 642) this tribe has been of the opinion that condemnation proceedings for certain public purposes could be had through the lands of the Grand Portage Indian Reservation.

That treaty in setting aside certain lands for the Grand Portage Band of Chippewa Indians provided in Article 3 thereof:

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

This court in the case of United States vs. Shoshone Tribe, 58 Supreme Court Reporter 794, in interpreting an Indian treaty, stated that the same should be interpreted and construed in the sense in which it would be understood by the Indians. This treaty, and particularly the language above quoted, should not now be interpreted narrowly, contrary to the wishes of this tribe, and in such a manner as to prevent the tribe from obtaining the use and benefits of the road right-of-way which the State of Minnesota is attempting to acquire.

The government may urge before this court as it did before the lower courts, that the Indian Reorganization Act (48 Stats. 984) as amended, repeals or supersedes the Act of March 3, 1901, Chapter 832, Sec. 3 (25 U. S. C. 357). This theory would imply that all the pre-existing direct or indirect statutes or laws of a general or special nature in relation to allotted lands have been expressly repealed by this act. Certainly Congress had no such intent in passing this act. It cannot fairly be said that said repeal is effected by implication, particularly in light of the spirit and intent of such Indian Reorganization Act. This court has stated that repeals by implication are not favored and there is no need to cite specific authorities for this common principle of law. There is no need to go into a full discussion of the Indian Reorganization Act. It can affirmatively be stated that so far as allotments are concerned the Act merely extends the periods of trust on such lands until otherwise directed by Congress. Lands of this nature therefore, are still held by the individual Indians under their trust pat-

ents, and would, therefore, still be subject to the existing acts of Congress applicable thereto, including the Act of March 3, 1901, authorizing condemnation thereof for any public purpose.

The need for this road to serve the Grand Portage-Grand Marais Indians of Minnesota is clearly established by the Resolutions hereinafter set forth. These Resolutions, passed unanimously by the Executive Council of the Minnesota Chippewa Tribe and by the local council of the Grand Portage-Grand Marais Band, indicate clearly the necessity of this road to serve the Indian community of Grand Portage. The attitude of the Indians can best be expressed by the statement that they feel that the Department of the Interior will be consigning them to virtual isolation in denying them the road in question.

Herewith follows the Resolutions mentioned:

**RESOLUTION ADOPTED BY
GRAND PORTAGE-GRAND MARAIS BAND OF
MINNESOTA CHIPPEWA INDIANS**

"WHEREAS, there is now pending upon appeal from the Circuit Court to the Supreme Court of the United States, the case of the United States vs. the State of Minnesota and various State Highway Officials, involving the right of the State of Minnesota to condemn, for highway purposes a right-of-way over and across the Grand Portage Indian Reservation in Minnesota, being an extension of Highway 61, and

WHEREAS, there is a unanimous desire on the part of the Indian population located in said Reservation, that said proposed highway be located and constructed on and along the line surveyed by the State of Minnesota adjacent to the shore-line of Lake Superior, and

WHEREAS, a highway so located and constructed would serve to benefit our people in a matter to—

- (1) Provide a suitable ingress and egress to and from our Community;
- (2) Provide a necessary highway for transportation of our children to the High School at Grand Marais;
- (3) Afford an all-around year road, as readily accessible in winter as in summer;
- (4) Afford our people an opportunity to profit from the tourist trade, not now enjoyed;
- (5) Afford a needed facility for transportation from our Reservation of fish and other articles produced by our people and allowing them access to several miles more of lake shore for their commercial fishing activities; And

WHEREAS, the location of the road as desired by the Department of the Interior is wholly contrary to the interests and needs of our people, and would be located so as to cut through the heart of our wilderness which we desire be kept inviolate,

Now, Therefore, be it Resolved by the Grand Portage and Grand Marais Band of Chippewa Indians of Minnesota that we do hereby request and direct our Tribal Attorney to file a brief in said appeal in our behalf with the Supreme Court of the United States, setting forth reasons in support of the location of the extension of said Highway 61 over and across our Reservation in the manner proposed by the State of Minnesota.

Be it further resolved that this resolution constitute a direct appeal to the United States Supreme Court for the relief herein requested and that this resolution be incorporated in our brief to be filed in said case.

Be it further resolved that we do hereby request that the Tribal Executive Committee of the Minnesota Chippewa Tribe endorse this resolution.

SAM CRAWFORD,
Chairman of Council,
Grand Portage Band of Chippewa
Indians in Minnesota.

JOHN FLATTE,
Secretary."

**RESOLUTION ADOPTED BY
TRIBAL EXECUTIVE COMMITTEE OF THE
MINNESOTA CHIPPEWA INDIANS.**

"BE IT RESOLVED That the Tribal Executive Committee does hereby authorize and instruct its Tribal Attorney to file a brief in the appeal before the United States Supreme Court in the case involving the right of the State of Minnesota to construct Highway No. 61 over and across the Grand Portage Reservation in accordance with the Resolution adopted by the Local Council of the Grand Portage-Grand Marais Band of Chippewa Indians of Minnesota, copy of which resolution is herewith incorporated, as follows:

WHEREAS, there is now pending upon appeal from the Circuit Court to the Supreme Court of the United States, the case of the United States vs. the State of Minnesota and various State Highway Officials, involving the right of the State of Minnesota to condemn, for highway purposes a right-of-way over and across the Grand Portage Indian Reservation in Minnesota, being an extension of Highway 61, and

WHEREAS, there is a unanimous desire on the part of the Indian population located in said Reservation, that said proposed highway be located and constructed on and along the line surveyed by the State of Minnesota adjacent to the shore-line of Lake Superior, and

WHEREAS, a highway so located and constructed would serve to benefit our people in a manner to:

- (1) Provide a suitable ingress and egress to and from our Community;
- (2) Provide a necessary highway for transportation of our children to the High School at Grand Marais;
- (3) Afford an all-around year road, as readily accessible in winter as in summer;
- (4) Afford a needed facility for transportation from our Reservation of fish and other articles produced by our people and allowing them access to several miles

more of lake shore for their commercial fishing activities; and

WHEREAS, the location of the road as desired by the Department of the Interior is wholly contrary to the interests and needs of our people, and would be located so as to cut through the heart of our wilderness which we desire be kept inviolate,

NOW, THEREFORE, Be it Resolved by the Grand Portage and Grand Marais Band of Chippewa Indians of Minnesota that we do hereby request and direct our Tribal Attorney to file a brief in said appeal in our behalf with the Supreme Court of the United States, setting forth reasons in support of the location of the extension of said Highway 61 over and across our Reservation in the manner proposed by the State of Minnesota.

Be it further resolved that this resolution constitute a direct appeal to the United States Supreme Court for the relief herein requested and that this resolution be incorporated in our brief to be filed in said case.

BE IT FURTHER Resolved that we do hereby request that the Tribal Executive Committee of the Minnesota Chippewa Tribe endorse this resolution.

(Adopted at June 6, 1938, meeting.)

T. J. FAIRBANKS,

Secretary

Minnesota Chippewa Tribe."

CONCLUSION.

Your petitioners respectfully urge upon the Court that the wishes and welfare of the Minnesota Chippewa Tribe be granted in order that they may be afforded the facilities of a highway to serve the necessary requirements of the Grand Portage Reservation and the Chippewa Indians living thereon.

WHEREFORE, Petitioners pray that the judgment of the United States Circuit Court of Appeals, Eighth Circuit, be

in all things reversed and that the order of the Federal District Court, District of Minnesota, Fifth Division, granting the condemnation of the State of Minnesota, be in all things affirmed.

Respectfully submitted,

JOHN H. HOUGEN,

Tribal Attorney,

Minnesota Chippewa Tribe and

Grand Portage-Grand Marais

Band thereof,

Rand Tower,

Minneapolis, Minnesota.

SUPREME COURT OF THE UNITED STATES.

No. 78.—OCTOBER TERM, 1938.

State of Minnesota,
vs.
United States.

} On Certiorari to the United States
Circuit Court of Appeals for the
Eighth Circuit.

[January 3, 1939.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

Minnesota brought in a court of the State this proceeding to take by condemnation pursuant to its laws a right of way for a highway over nine allotted parcels of land which form parts of the Grand Portage Indian Reservation, granted for the Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and the Act of Congress, January 14, 1889, c. 24, 25 Stat. 642. The parcels had been allotted in severalty to individual Indians by trust patents. The highway was located pursuant to requirements of the Constitution of the State. It was not shown that authority had been obtained from the Secretary of the Interior for the construction of the highway over the Indian lands. The petition named as persons interested the owners under the Indian-allotments, the Superintendent of the Consolidated Chippewa Agency, and the United States, as holder of the fee in trust.

The United States was named as a party defendant. The United States Attorney, appearing specially for the United States and generally for the other respondents, filed a petition for the removal of the cause to the federal court. He and counsel for the State stipulated that the cause "may be [so] removed." The state court ordered removal. In the federal court, the United States, appearing specially, moved to dismiss the action on the ground that it had not consented to be sued and that the state court had no jurisdiction of the action or over the United States. The motion to dismiss was denied on the ground that the United States is not a necessary party, since "consent . . . to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant

to 25 United States Code Annotated, Section 857," (Act of March 3, 1901, c. 832, Sec. 3, 31 Stat. 1038, 1083-84), the second paragraph of which provides:

"That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The petition for condemnation was granted.

Upon appeal by the United States, the Circuit Court of Appeals held that the State was without power to condemn the Indian lands unless specifically authorized so to do by the Secretary of the Interior, as provided in Section 4 of the Act of 1901, which provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated . . . through any lands which have been allotted in severalty to any individual Indians . . . but which have not been conveyed to the allottees with full power of alienation."

It held, further, that as such authorization had not been shown, the United States had not consented to the maintenance of the condemnation suit against it; that the court was without jurisdiction to proceed; and that the fact that removal from the state court to the federal court had been obtained by the United States Attorney by stipulation had not effected a general appearance. The Circuit Court of Appeals, therefore, reversed the judgment of the District Court with directions to dismiss. 95 F. (2d) 468. Certiorari was granted because of alleged conflict with the established administrative practice under the applicable statutes and the importance of the question presented. 305 U. S. —.

The State contends that it had power, and its courts jurisdiction, to condemn the allotted lands without making the United States a party to the proceedings: (1) because authorized so to do by the second paragraph of Section 3 of the Act of March 3, 1901, quoted above; (2) because authorized so to do by the Treaty of September 30, 1854, 10 Stat. 1109, 1110, approved by Congress January 14, 1889, which provided in Article III—

"All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right

of way through the same, compensation being made therefor as in other cases."

(3) because the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional state trunk highway required to be so located and constructed by its constitution and laws, may, without express congressional authority therefor, exercise its inherent power of eminent domain for such purpose over lands so allotted in severalty to individual Indians.

The Minnesota Chippewa Tribe and the Grand Portage-Grand Marais Band thereof filed by the tribal attorney a brief praying that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed.

First. The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. *The Siron*, 7 Wall. 152, 154; *Carr v. United States*, 98 U. S. 433, 437; *Stanley v. Schwalby*, 162 U. S. 255. Compare *Utah Power & Light Co. v. United States*, 243 U. S. 389. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party.¹ The exemption of the United States from being sued without its consent extends to a suit by a state. Compare *Kansas v. United States*, 204 U. S. 331, 342; *Arizona v. California*, 298 U. S. 558, 568, 571, 572. Compare *Minnesota v. Hitchcock*, 185 U. S. 373, 382-387; *Oregon v. Hitchcock*, 202 U. S. 60. Hence Minnesota cannot maintain this suit against the United States unless authorized by some act of Congress.

¹ The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land. *United States v. Bickert*, 188 U. S. 482; compare *Tiger v. Western Investment Co.*, 221 U. S. 286; *Brader v. James*, 246 U. S. 88. In the case of patents in fee with restraints on alienation it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect but that the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto. *Bowling & Miami Investment Co. v. United States*, 283 U. S. 28; *Privett v. United States*, 256 U. S. 201; *Sunderland v. United States*, 26 U. S. 226. In the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands. Compare *McKay v. Kalyton*, 204 U. S. 458.

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Minnesota contends that the United States is not an indispensable party. It argues that since the second paragraph of Section 3 of the Act of March 3, 1901, provides that "the money awarded as damages shall be paid to the allottee", the United States has no interest in the land or its proceeds after the condemnation is begun.² Under Section 5 of the General Allotment Act, Act of February 8, 1887, c. 119, 24 Stat. 388, 389, U. S. C. Title 25, § 348, the Indians' interest in these allotted lands was subject to restraints on alienation;³ and by Section 2 of the Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title 25, § 462, restraints on alienation were extended. The clause quoted may not be interpreted as freeing the allottee's land from the restraint imposed by other acts of Congress. As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, c. 333, 47 Stat. 474, U. S. C. Title 25, § 409a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions.⁴

² The extent of the restraints on alienation contained in Section 5 of the General Allotment Act was clarified and modified to some extent by subsequent legislation. E. g., Act of May 27, 1902, c. 328, § 7, 32 Stat. 245, 275; Act of May 8, 1906, c. 2948, 34 Stat. 182; Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018; Act of May 29, 1908, c. 216, 35 Stat. 444; Act of June 25, 1910, c. 431, §§ 1-5, 36 Stat. 855-56; Act of May 18, 1910, c. 125, 39 Stat. 123, 127; U. S. C. Title 25, §§ 349, 372, 373, 378, 379, 403, 404, 405, 408. Under Section 4 of the Indian Reorganization Act, applicable to all Indian Reservations unless a majority of the adult Indian vote against its application, the transferability of restricted Indian lands is greatly limited. Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title 25, § 464.

³ Compare the Act of March 1, 1907, c. 2285, 34 Stat. 1018, U. S. C. Title 25, § 405; Act of June 25, 1910, c. 431, §§ 4, 8, 36 Stat. 856-57; U. S. C. Title 25, §§ 403, 406.

⁴ Whenever "any nontaxable land of a restricted Indian of the Five Civilised Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance." See also note 7, *infra*.

Second. Minnesota contends that Congress has authorized suit against the United States. It is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought. This suit was begun in a state court. The fact that the removal was effected on petition of the United States and the stipulation of its attorney in relation thereto are facts without legal significance. Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States. Compare *Case v. Terrell*, 11 Wall. 199, 202; *Carr v. United States*, 98 U. S. 433, 435-39; *Finn v. United States*, 123 U. S. 227, 232-33; *Stanley v. Schwalby*, 162 U. S. 255, 270; *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533-35. If Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction. *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 383; *General Investment Co. v. Lake Shore Ry. Co.*, 260 U. S. 261, 288.

Third. Minnesota contends that Congress authorized suit in a court of the state by providing in the second paragraph of Section 3 of the Act of March 3, 1901, quoted above, for "condemnation of" lands allotted in severalty to Indians "in the same manner as land owned in fee." But the paragraph contains no permission to sue in the court of a state. It merely authorizes condemnation for "any public purpose under the laws of the State or Territory where located." There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.⁵

⁵ Compare *McKay v. Kalyton*, 204 U. S. 458; 28 Stat. 305; 31 Stat. 760; U. S. C. Title 25, § 345. The United States argues that a statute granting permission to sue the United States must be construed to apply only to

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Minnesota asserted in support of its interpretation of the paragraph that by long established administrative practice such condemnation proceedings are brought in the state court and without making the United States a party.⁶ The assertion was denied by the Government. As the brief of neither counsel furnished adequate data as to the administrative practice, they were requested at the oral argument to furnish the data thereafter. From the report then submitted by the Solicitor General it appears that throughout a long period the Secretary of the Interior has insisted in Minnesota and in other States, that condemnation suits must be brought in a federal court and that the United States must be made a party defendant.⁷

As the lower court had no jurisdiction of this suit, we have no occasion to consider whether, as a matter of substantive law, the lack of assent by the Secretary of the Interior precluded maintenance of the condemnation proceeding.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

the federal courts unless there is an explicit reference to the state tribunals, citing *Stanley v. Schwalby*, 162 U. S. 255, 270; *United States v. Inaba*, 291 Fed. 416, 418; *United States v. Deasy*, 24 F. (2d) 108, 110. This is not universally true even as to suits against the United States itself. *United States v. Jones*, 109 U. S. 513. And in many instances the state courts have been held to have jurisdiction of suits against the instrumentalities and officers of the United States which directly affect its property interests without such specific statutory authorization. *Missouri Pacific R. R. v. Ault*, 266 U. S. 554; *Bloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, 568-69; *Olson v. United States Spruce Production Corporation*, 267 U. S. 462; *Federal Land Bank v. Priddy*, 295 U. S. 230, 235-37. Compare *Davis v. L. N. Dantler Lumber Co.*, 261 U. S. 280.

* In 55 Land Decisions 648 the Acting Secretary of the Interior handed down on June 29, 1907, an opinion which recognized, without any discussion, the validity of a condemnation proceeding brought under the second paragraph of the Act of March 3, 1901, in a state court, it not appearing that the United States was joined as a party.

? See also Regulation 60½ of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," adopted in the general revision of April 7, 1938, which provides: "As the holder of the legal title to all allotted Indian lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the appropriate federal district court, the procedure, however, to follow the provisions of the State law on the subject, so far as applicable."

